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APPENDIX.

IN THE

Supreme Court of the United States

October Term, 1974
No. 74-156

CECIL HICKS,

Appellant,

vs.

VINCENT MIRANDA,

Appellee.

Appeal From the United States District Court for the Central District of California.

APPEAL DOCKETED AUGUST 22, 1974.
JURISDICTION POSTPONED NOVEMBER 18, 1974.

APPENDIX

Page

Chronological List of Relevant Docket Entries 5

Complaint for Damages, Declaratory Relief and Injunction, Pursuant to the Civil Rights Act [42 U.S.C. 1983] 10

Order to Reassign Case 20

Affidavits in Support of Application for Temporary Restraining Order 21

(a) Second Affidavit of David M. Brown in Support of Application for Temporary Restraining Order 21

(b) Affidavit of Edward Bailey [R. pp. 30-34] 25

(c) Affidavit of Carl Schmidt 30

(d) Affidavit of Richard W. Witte 31

(e) Affdavit of Donna Stockdale [R. p. 29] 31

(f) Affidavit of David M. Brown [R. pp. 40-43] 32

(g) Affidavit of Donald J. Haley [R. pp. 47-48] 35

Excerpts From Affidavits in Opposition to Application for Temporary Restraining Order 36

(a) Affidavit of Judge John H. Smith, Jr. [R. pp. 71-72] 36

(b) Affidavit of Arthur Fontecchio [R. pp. 73-76] 37

(c) Affidavit of Thomas R. Hofdahl [R. pp. 77-80] 42

(d) Affidavit of John F. Anderson 46

(e) Declaration of Cecil Hicks 51

(f) Affidavit of Daniel Harrison 52

(g) Affidavit of Oretta D. Sears 54

Notification and Certificate (Three Judge District Court) 55

Page

Order 55

Defendant's Answer to Complaint for Declaratory Judgment, Damages and Injunction 59

Excerpts From State Court Orders, Pleadings, and Proceedings (Federal Court Attachments and Exhibits) 64

(a) State Order to Show Cause 64

(b) Application for Order to Show Cause in State Court [R. pp. 24-25] 66

(c) Excerpts From Reporter's Transcript of State Court Proceedings Held November 27-28, 1973 [R. pp. 283-319] 67

(d) Appendix B to Affidavit of David Brown [R. p. 26] 75

(e) Excerpts From Transcript of State Municipal Court Proceedings [R.T. pp. 369-399] Filed as Attachment to Affidavit of David Brown on February 2, 1974 75

Affidavit of David Brown in Support of Preliminary Injunction Filed February 25, 1974 [R.T. pp. 365-367] 80

Minute Order Retransferring Case [R. p. 340] 82

Clerk's Letter [R. pp. 341-342] 82

Order Designating United States Circuit Judge and United States District Judges Pursuant to §2284, Title 28, United States Code [R. p. 342] 84

Affidavit in Support of Defendant's Motion to Dismiss [R. pp. 404-405] 86

Order Regarding Submission of the Merits of the Action [R. pp. 427-428] 89

Page

Notice of Motion for Rehearing and for Relief From Judgment and to Amend and Alter Judgment and to Correct Errors in the Judgment and Record and to Stay Judgment Pending Determination of That Motion (F.R.C.P. 59 (a), 59 (e), 60 (a), 60 (b), and (62) [R. p. 531] 90

Notice of Motion for Relief From Judgment, for Rehearing, and for Stay of Judgment Pending Determination of That Motion [R. p. 533A] .. 91

(a) Municipal Court Complaint (Attachment (A) to Motion for Relief From Judgment) [R. p. 574] 91

Order Re Hearing on Motions Filed June 24, 1974 [R. pp. 597-8] 93

Affidavit of David Brown in Partial Opposition to Stay 94

Application for Order to Show Cause in Re Contempt 96

(a) Affidavit of David M. Brown in Support of Application in Re Contempt 97

(b) Exhibit A in Support of Application 103

(c) Exhibit B in Support of Application 104

(d) Exhibit C in Support of Application 105

(e) Exhibit D in Support of Application 108

Order of Seizure After Adversary Hearing 110

Order of Seizure After Adversary Hearing 112

Supplemental Points and Authorities in Support of Defendants' Motion for Relief From Judgment and for Rehearing 114

Affidavit of Oretta D. Sears in Support of Answer to Order to Show Cause in Re Contempt 117

Supplemental Memorandum Opinion 120

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APPENDIX.

INDEX

Page

Chronological List of Relevant Docket Entries.... p. 5

Plaintiff's Complaint for Damages, Declaratory Relief and Injunction ..... p. 10

Order to Reassign Case ..... p. 20

Excerpts from Affidavits in Support of Application for Temporary Restraining Order

(a) Second Affidavit of David M. Brown ..... p. 21
(b) Affidavit of Edward Bailey ..... p. 25
(c) Affidavit of Carl Schmidt ..... p. 30
(d) Affidavit of Richard W. Witte ..... p. 31
(e) Affidavit of Donna Stockdale ..... p. 31
(f) Affidavit of David M. Brown ..... p. 32
(g) Affidavit of Donald J. Haley ..... p. 35

Excerpts from Affidavits in Opposition to Application for Temporary Restraining Order

(a) Affidavit of Judge John H. Smith, Jr. .... p. 36
(b) Affidavit of Arthur Fontecchio ..... p. 37
(c) Affidavit of Thomas Hafdahl ..... p. 42
(d) Affidavit of John F. Anderson ..... p. 46
(e) Declaration of Cecil Hicks ..... p. 49
(f) Affidavit of Daniel Harrison ..... p. 52
(g) Affidavit of Oretta D. Sears ..... p. 54

Notification and Certificate (Three Judge District Court) ..... p. 55

Answers of Defendants ..... p. 59

Excerpts from State Court Orders and Pleadings (Attachments to Federal Court Pleadings)

(a) State Order to Show Cause, Temporary Restraining Order and Order Shortening Time ..... p. 64
(b) Application for Order to Show Cause ..... p. 66
(c) Reporter's Transcript of State Court Proceedings Held November 27, 28, 1973 .... p. 67
(d) Appendix B to Orange County Superior Court ..... p. 75
(e) Excerpts from Reporter's Transcript of State Municipal Court Proceedings ..... p. 75

Affidavit of David M. Brown in Support of Preliminary Injunction ..... p. 80

Minute Order Retransferring the Case ..... p. 82

Federal Court Clerk Letter re Three Judge Court.. p. 82

Order Designating Three Judge Court ..... p. 84

Affidavit of Brent Swanson in Support of Defendants' Motion to Dismiss ..... p. 86

Order Regarding Submission of the Merits of the Action ..... p. 89

Judgment and Opinion Entered June 14, 1974 Omitted Because Printed as Appendix A pp. 1-21 of Jurisdictional Statement

Defendants' Notice of Motion for Rehearing and for Relief from Judgment and to Amend Judgment ..... p. 90

Defendants' Notice of Motion for Relief from Judgment, for Rehearing and for Stay ..... p. 91

(a) Municipal Court Complaint (Attachment A in Support of Motion) ..... p. 91

Order re Hearing on Motions ..... p. 93

Supplemental Points and Authorities in Support of Motion for Relief from Judgment ..... p. 114

Affidavit of David Brown in Partial Opposition to Stay

Application for Order to Show Cause and Attachments

Order to Show Cause in re Contempt not Set Forth Because It Appears in Full as Appendix C (pp. 26-29) to the *Jurisdictional Statement.*

Affidavit of Oretta Sears in Support of Answer to Order to Show Cause ..... p. 117

Amended Judgment and Opinion entered September 30, 1974

State Appellate Court Order

[Note: Jurats and Affidavits of Service Omitted in Printing as to all Documents and Affidavits]

Chronological List of Relevant Docket Entries.

November 29, 1973—Plaintiffs-Appellees complaint for damages, declaratory relief and injunction in the case of Miranda et al v. Hicks et al, No. 73-2775, filed in United States District Court, California Central District, Los Angeles, California.

November 29, 1973—Affidavits of Carl Schmidt, Richard W. Witte, Edward Bailey, Donna Stockdale, Donald J. Haley and David M. Brown filed by Plaintiffs-Appellees in support of application for temporary restraining order and order to show cause.

November 29, 1973—Order to reassign case filed by Judge Warren J. Ferguson.

December 3, 1973—Minute Order by Judge Lydick.

December 3, 1973—Affidavits of John H. Smith Jr., (Judge of the Orange County Municipal Court), Arthur Fontecchio, Thomas R. Hafdahl, Daniel Harrison, John F. Anderson, and Oretta D. Sears and certified copies of search warrants, affidavits and returns filed by defendants-appellants in opposition to application for temporary restraining order and order to show cause.

December 3, 1973—Hearing before Judge Lawrence T. Lydick on order to show cause.

December 28, 1973—Notification and certificate requesting that a three judge court be convened filed by Judge Lawrence T. Lydick.

December 28, 1973—Order denying temporary restraining order and finding that defendants-appeliants acted lawfully and pursuant to lawful orders of the state court filed by United States District Judge Lawrence T. Lydick.

January 14, 1974—Summons and complaint in the case of *Miranda et al v. Hicks et al* No. 73-2775 officially served on defendants-appellants.

January 29, 1974—Answer to complaint for declaratory judgment damages and injunction filed by defendants-appellants.

January 29, 1974—Affidavits of Orange County Municipal Court Judge John H. Smith Jr., Arthur Fontecchio, Thomas R. Hafdahl, Daniel Harrison, John F. Anderson, Cecil Hicks and Oretta D. Sears were filed by defendants-appellants in support of the answer to the complaint.

January 29, 1974—Certified copies of the state search warrants, affidavits in support and returns thereof, certified copies of order to show cause, temporary restraining order and order shortening time issued by Orange County Superior Court on November 27, 1973, application for the above order to show cause, certified copy of reporter's transcript of hearing on order to show cause and certified copy of "order of seizure after adversary hearing", were filed by defendants-appellants in support of their answer.

January 30, 1973—Notice of motion and motion to dismiss complaint requesting hearing date of March 4, 1974 before United States District Court Judge Lawrence T. Lydick filed by defendants-appellants.

February 4, 1974—Minute order entered by United States District Court Judge Ferguson on the court's own motion transferring the hearing from Judge Lydick's courtroom to his own courtroom.

February 8, 1974—Letter of Kim Schwidgalt, deputy clerk to Judge Lydick informing the parties that by order of the Ninth Circuit District Judge (dated

January 8th 1974) the Honorables Ely, Ferguson and East had been appointed to hear the matter pursuant to §2284 title 28 and that henceforth all filings should be directed to those judges.

February 8, 1974—Notice of motion and motion to dismiss claim for damages without prejudice and for preliminary injunction filed by plaintiffs-appellees.

February 15, 1974—Notice of motion and motion to dismiss complaint and for summary judgment with proposed findings of fact, conclusions of law and order filed by defendants-appellants.

February 25, 1974—Affidavit of David M. Brown in support of motion for preliminary injunction filed by plaintiffs-appellees.

February 25, 1974—Reporter's transcript of the proceedings had in Orange County Municipal Court filed by plaintiffs-appellees.

February 28, 1974—Affidavit of C. Brent Swanson in support of defendants-appellants motion to dismiss filed by defendants-appellants.

March 4, 1974—Hearing on defendants-appellants motion to dismiss and for summary judgment, plaintiffs-appellees motion to dismiss claim for damages without prejudice and plaintiffs-respondents motion for preliminary injunction argued in United States District Court before Judge Ferguson.

March 7, 1974—Order granting plaintiffs-appellees motion to dismiss and denying defendants-appellants motion to dismiss entered by Judge Ferguson.

March 20, 1974—Notice of pendency of the action to Attorney General of California filed by three-judge court.

March 20, 1974—Order ordering issue of harassment submitted on the merits and asking for briefing on constitutionality of Penal Code Section 311.2 filed by three judge court.

April 4, 1974—Memorandum regarding defendants' harassment filed by plaintiffs-appellees.

April 15, 1974—Response filed by defendants-appellants Hicks and Sears.

April 22, 1974—Response filed by defendants-appellants Gourley, Fontecchio, Hafdahl and Harrison.

June 4, 1974—Opinion and judgment of three-judge court entered finding defendants-appellants guilty of harassment, declaring the California statute to be unconstitutional and ordering the return of all copies seized.

June 14, 1974—Notice that on July 1, 1974 a motion for rehearing and for relief from judgment and to amend and alter judgment would be filed by defendants-appellants Gourley, Fontecchio, Hafdahl and Harrison was filed by defendants-appellants.

June 14, 1974—Notice that on July 1, 1974 defendants-appellants Hicks and Sears would move the court for relief from judgment pursuant to Rules 60(b) and 62 of the Federal Rules of Civil Procedure was filed by defendants-appellants Hicks and Sears.

June 14, 1974—Points and authorities in support of motion for relief from judgment, certified copy of docket and complaint of the Orange County criminal case, and affidavits of Orange County Municipal Court Judge John H. Smith, Jr., of Thomas R. Hafdahl and of Brent Swanson filed by defendants-appellants Cecil Hicks and Oretta Sears.

June 24, 1974—Order declaring motions submitted filed by the court.

July 5, 1974—Notice of appeal.

August 3, 1974—Order to show cause in re contempt and temporary restraining order issued.

August 12, 1974—Hearing on order to show cause before Judge Ferguson.

September 30, 1974—Supplemental opinion filed and amended judgment entered substantially reaffirming prior decision.

Complaint for Damages, Declaratory Relief and Injunction, Pursuant to the Civil Rights Act [42 U.S.C. 1983].

United States District Court, Central District of California.

Vincent Miranda, doing business as Walnut Properties; and Pussycat Theatre Hollywood, a California corporation, Plaintiffs, vs. Cecil Hicks, District Attorney of the County of Orange, State of California; Oretta D. Sears, Deputy District Attorney of the County of Orange, State of California; Dudley D. Gourley, Chief of Police of the City of Buena Park, County of Orange, State of California; Arthur Fontecchio, Richard Hafdahl, and Daniel Harrison, Officers of the Police Department of the City of Buena Park, County of Orange, State of California, Defendants. Civil No. 73-2775 F.

Filed November 29, 1973—Served January 14, 1974 [R. pp. 1-9].

I

The jurisdiction of this Court is invoked under Title 28 U.S.C 1343 (3) and (4) and 42 U.S.C. 1983, this being an action:

A. To redress the deprivation, under color of state law, of rights, privileges and immunities secured to Plaintiffs by the Constitution of the United States, particularly the First, Fourth and Fourteenth Amendments thereto; and

B. To recover damages and to secure equitable and other relief under an act of Congress, providing for the protection of civil rights.

II

The jurisdiction of this Court is also invoked under 28 U.S.C. 1331, this being an action wherein the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $10,000.00, and arises under the Constitution and laws of the United States, and particularly the First, Fourth and Fourteenth Amendments to the United States Constitution.

III

This is also a case where the Plaintiffs are seeking a declaration of their rights under the Constitution and the laws of the United States and under 28 U.S.C. 2201 and 2202. This Court, in a case of actual controversy within its jurisdiction, may declare the right of Plaintiffs seeking such declaration.

IV

This is also an action which seeks injunctive relief restraining the enforcement, operation and execution of state statutes by restraining the officers of said State in the enforcement and execution of said statutes, upon the ground that the said statutes, on their face, and as construed and applied to Plaintiffs, violate the provisions of the First, Fourth and Fourteenth Amendments to the United States Constitution and, therefore, pursuant to 28 U.S.C. 2281 and 2284, the application for such injunctive relief should be heard and determined by a District Court of three judges.

V

Plaintiff VINCENT MIRANDA, doing business as WALNUT PROPERTIES (hereinafter referred to as "MIRANDA") is the owner of the land located at 6177 Beach Boulevard, City of Buena Park, County of Orange, State of California. Plaintiff PUSSYCAT

THEATRE HOLLYWOOD (hereinafter referred to as the "Theatre") is a California corporation, duly organized and existing under the laws of the State of California. The Theatre is engaged in the business of operating a motion picture theatre known as the Pussycat Theatre, Buena Park, located at 6177 Beach Boulevard, City of Buena Park, County of Orange, State of California.

VI

Defendant CECIL HICKS is the District Attorney for the County of Orange, State of California; Defendant ORETTA SEARS is a Deputy District Attorney of the County of Orange, State of California; Defendant DUDLEY D. GOURLEY is the Chief of Police of the City of Buena Park, County of Orange, State of California; Defendants ARTHUR FONTECCHIO, RICHARD HAFDAHL and DANIEL HARRISON are Officers of the Police Department of the City of Buena Park, County of Orange, State of California.

VII

The acts and practices of the Defendants, their agents, servants and employees, as hereinafter alleged, were performed under color of law and therefore constituted acts of the State within the meaning of 42 U.S.C. 1983 and the Fourteenth Amendment to the United States Constitution.

VIII

Prior to November 23, 1973, the motion picture film entitled "Deep Throat" was widely exhibited throughout the United States in motion picture theatres to adult audiences, and has gained a nationwide reputation and critical acclaim, and possesses serious, artistic, political, scientific, educational, and other values. The said film

is not obscene nor otherwise unlawful but, on the contrary, is expression entitled to the protection of the free speech and press provisions of the First and Fourteenth Amendments to the United States Constitution.

IX

On November 23, 1973, the Theatre commenced exhibiting the said film at the Pussycat Theatre, Buena Park. After the completion of the first exhibition of the said film at the said Theatre, Defendants FONTECCHIO, HAFDAHL and HARRISON seized the print of the film which had just been exhibited at the Theatre. In addition to seizing a print of the film, said Defendants seized cash in the amount of $305.00, which represented all of the monies in the cash drawer of the Theatre. The seizure occurred at approximately 1:35 p.m.

X

On November 23, 1973, at approximately 4:37 p.m., Defendants FONTECCHIO, HAFDAHL and HARRISON seized a second complete print of the film "Deep Throat", which was then being exhibited at the theatre. At the same time, the said Defendants seized from the Theatre's cash drawer the sum of $159.00.

XI

On November 23, 1973, at approximately 11:45 p.m., Defendants FONTECCHIO, HAFDAHL and HARRISON seized a third and complete print of the film "Deep Throat" from the Theatre. Said Defendants also brought a locksmith to the Theatre who, at said Defendants' direction, opened the Theatre's safe, whereupon cash in the sum of $4,082.33 was seized from the safe by said Defendants.

XII

The next day, Saturday, November 24, 1973, the Theatre began its first exhibition of the film "Deep Throat" at approximately 12:33 p.m. At approximately 5:55 p.m., Defendants FONTECCHIO, HAFDAHL and HARRISON seized a fourth complete print of the film "Deep Throat" from the theatre, and also seized all cash present in the sum of $197.18, which included receipts from the sale of concessions. After the said seizure of the fourth print of the film, the Theatre was closed to the public, thereby cancelling all scheduled performances for the remainder of the day. The Theatre remained closed to the public all day Sunday, November 25, 1973, and through the afternoon of Monday, November 26, 1973.

XIII

As a result of the seizure of the four prints of the film "Deep Throat" from the Theatre, the Theatre was rendered unable to continue exhibition of the said film, as previously scheduled and advertised to the public. During the seizure of one of the prints of the film, Defendant HARRISON stated that every print of the film "Deep Throat" which might be exhibited at the Theatre would be seized "because this is Orange County."

XIV

The conduct of Defendants FONTECCHIO, HAFDAHL and HARRISON, described above, was undertaken at the direction of Defendants GOURLEY, HICKS and SEARS.

XV

On November 27, 1973, after the Theatre had already been prevented from further exhibition of the film "Deep Throat" due to the four seizures described

above, Defendants HICKS, SEARS, GOURLEY and FONTECCHIO sought and obtained from a Judge of the Superior Court for the County of Orange, State of California, a Temporary Restraining Order preventing the Theatre from exhibiting the film "Deep Throat" pending a hearing on an Order to Show Cause why all copies of the film should not be seized as "contraband."

XVI

On November 28, 1973, the said Defendants sought and obtained from the said Judge of the Superior Court, an order to seize all copies of the film "Deep Throat" presently located at the Theatre and, in addition, to seize any copies of the said film which may be delivered or found at the Theatre on any future date.

XVII

The acts and practices of the Defendants complained of herein were initiated and conducted in bad faith and for the purpose of harassment. The multiple seizures of prints of the same film and the Defendants' conduct in obtaining an order for seizure of all prints of the film that may be found at the Theatre in the future, were not undertaken for bona fide purposes of law enforcement, since, as the Defendants, and each of them, well knew, only one print of the film was necessary for use as evidence in any contemplated state criminal prosecution. On the contrary, the aforesaid conduct of the Defendants, and their conduct in seizing all cash present at the Theatre, was undertaken solely to prevent the Theatre from exhibiting the film "Deep Throat" to the public prior to any final judicial determination of its alleged obscenity, in knowing and intentional violation of Plaintiffs' rights under the First, Fourth and Fourteenth Amendments to the United States Constitution.

The true intent and purpose of the conduct of the Defendants, and each of them, is to establish censorship and to interfere with Plaintiffs' lawful business of exhibiting motion picture films; to impose prior restraint upon the exercise by Plaintiffs of freedom of expression; to intentionally engage in unlawful searches and seizures for the purpose of harassing Plaintiffs and injuring them in their business; to deny to the public access to motion picture films protected by the First and Fourteenth Amendments to the United States Constitution; and to subject Plaintiffs to arbitrary, capricious and irrational deprivation of liberty and property without due process of law, all in violation of the guarantees of the First, Fourth and Fourteenth Amendments to the United States Constitution.

XVIII

The conduct of the Defendants, and each of them, violated Plaintiffs' rights under the First, Fourth and Fourteenth Amendments to the United States Constitution in the following respects:

A. The multiple seizures of identical prints of the same film operates as a prior restraint of freedom of expression before a final judicial determination on the issue of obscenity;

B. The procedures employed by Defendants in obtaining a purported Order for the seizure of all copies of the film that may be found at the Theatre now and in the future, lacked all of the procedural safeguards required by the United States Supreme Court to guard against the undue suppression of freedom of expression; and such procedures operate as a prior restraint on freedom of expression prior to any final judicial determination on the issue of obscenity;

C. The multiple seizures of identical prints of the same film and the purported Order for seizure of all prints of the film constituted unreasonable searches and seizures and deprived Plaintiffs of their liberty and property without due process of law;

D. The seizure of all cash present at the Theatre was an unreasonable search and seizure and deprived Plaintiffs of their property without due process of law.

XIX

The aforesaid conduct of the Defendants was allegedly undertaken pursuant to the provisions of the California obscenity statute, Penal Code §§311, 311.2 and 311.5. The said statutes, on their face and as construed and applied to Plaintiffs, are unconstitutional in the light of the decisions of the United States Supreme Court in *Miller v. California*, 93 S.Ct. 2607 and companion cases, decided June 21, 1973, in violation of the free speech and press and due process guarantees of the First and Fourteenth Amendments to the United States Constitution.

XX

Unless restrained by the Court, Defendants will continue to cause Plaintiffs great and immediate irreparable injury for which there is no adequate remedy at law.

XXI

By reason of the wrongful conduct of Defendants, and each of them, as aforesaid, Plaintiffs have suffered damages in an amount not less than $2,000,000.00.

XXII

The wrongful conduct of the Defendants, and each of them, was undertaken in bad faith and for the

purpose of suppressing the exercise of constitutional rights by Plaintiffs, entitling Plaintiffs to exemplary and punitive damages in the sum of $2,000,000.00.

AS AND FOR A SECOND DISTINCT CAUSE OF ACTION, PLAINTIFFS ALLEGE:

XXIII

Plaintiffs refer to and incorporate herein, as if fully set forth, the allegations contained in Paragraphs I through XIX, inclusive, of the First Cause of Action.

XXIV

There is a bona fide dispute between the parties as to whether the California obscenity statutes, California Penal Code §§311, 311.2 and 311.5, on their face and as construed and applied to Plaintiffs herein, are unconstitutional, in violation of the free speech and press, and due process provisions of the First and Fourteenth Amendments to the United States Constitution. Plaintiffs allege, and Defendants deny, that the said statutes, on their face and as construed and applied, are unconstitutional in the following respect:

In the light of the decisions of the United States Supreme Court in *Miller v. California,* 93 S.Ct. 2607, and companion cases, decided June 21, 1973, the said state statutes are vague, ambiguous and overbroad, and do not provide fair or adequate notice of what conduct is prohibited by the said statutes, all in violation of the First and Fourteenth Amendments to the United States Constitution.

* * *

WHEREFORE, Plaintiffs pray:

1. For a Temporary Restraining Order, a Preliminary Injunction, and a Permanent Injunction, requiring the Defendants to deliver forthwith to Plaintiffs all prints of the motion picture film "Deep Throat" which have been seized by Defendants, permitting said Defendants to make and retain a single copy of the said film, requiring Defendants to deliver forthwith to Plaintiffs all cash seized from Plaintiffs' Theatre, and restraining Defendants from any further seizures of copies of the said film from Plaintiffs' Theatre.

2. For a judgment declaring that California Penal Code §§311, 311.2, and 311.5, on their face, and as construed and applied to Plaintiffs, are unconstitutional, in violation of the free speech and press and due process provisions of the First and Fourteenth Amendments to the United States Constitution.

3. For general damages in an amount not less than $2,000,000.00.

4. For exemplary and punitive damages in the sum of $2,000,000.00.

5. For such other and further relief as to the Court seems just and proper.

* * *

Order to Reassign Case.

Filed November 29, 1973 [R. p. 11]

(Caption omitted in printing)

The undersigned Judge, to whom the above-entitled case was assigned pursuant to Local Rule 2, being of the opinion that he should not try said case, by reason of . . . the fact that I was the attorney who incorporated the City of Buena Park and was its City Attorney from 1953 until 1959 when I was appointed to the bench. I participated in meetings with the City Manager, City Council and the then Chief of Police with reference to the employment of the defendant Dudley D. Gourley as a police officer . . . hereby orders the case reassigned by the Clerk in accordance with Local Rule 2 or other applicable rule or order of this Court [28 U.S.C. §137]; and

IT IS FURTHER ORDERED that the Clerk serve copies of this Order forthwith by United States Mail on counsel for all parties appearing in this cause.
Dated: November 29, 1973

Warren J. Ferguson
United States District Judge

* * *

Affidavits in Support of Application for Temporary Restraining Order.

(a) Second Affidavit of David M. Brown in Support of Application for Temporary Restraining Order.

Filed November 29, 1973 [R. pp. 12-16]

DAVID M. BROWN, being first duly sworn, deposes and says:

1. I am an attorney duly admitted to the practice of law in the State of California and am a member of the firm of FLEISHMAN, McDANIEL, BROWN & WESTON, a Professional corporation, attorney of record for Plaintiffs herein.

2. Following the preparation and signing of my initial Affidavit filed concurrently herewith, new developments have occurred which now leave no room for doubt that Defendant District Attorney HICKS and the Buena Park Police Department will continue by unlawful means to suppress the exhibition of the film "Deep Throat" at Plaintiffs' theatre prior to any final judicial determination of its alleged obscenity.

3. On November 27, 1973, at approximately 12:00 P.M., Defendant Officer FONTECCHIO served an Order to Show Cause, Temporary Restraining Order and Order Shortening Time upon Plaintiffs' theatre. The Temporary Restraining Order purported to prevent the theatre from

> "showing, exhibiting, displaying or advertising the movie 'Deep Throat': and further refrain from removing the said film from 6177 Beach Boulevard, Buena Park, or in any way disposing of said copies of said film until after the conclusion of this Order to Show Cause hearing." (A copy of the Order and the Application in support thereof is attached hereto as Appendix "A").

4. The Order to Show Cause required persons alleged to be in charge of the theatre to appear before the Orange County Superior Court

> "to show cause why all copies of the above said film should not be ordered seized as contraband."

The Order further provided that the hearing on the Order to Show Cause may be set at any time prior to Friday, November 30, 1973, upon request of counsel, provided counsel for the People receive one hour notice and subject to the schedule of the Court.

5. Immediately upon learning of the Temporary Restraining Order and Order to Show Cause, I called the office of Defendant HICKS and stated that I would immediately seek a hearing before the Orange County Superior Court Judge who had issued the Order, the Honorable BYRON K. McMILLAN. A hearing was commenced before Judge McMillan at approximately 2:45 P.M., November 27, 1973.

6. Prior to appearing, I lodged with Judge McMillan's clerk a document entitled "Reservation of Federal Constitutional Questions," stating that

> "By appearing in the above-entitled action, Defendants [VINCENT MIRANDA, etc., et al.] do not waive but, on the contrary, specifically reserve all federal constitutional claims for purposes of federal jurisdiction." (A copy of the said document is attached hereto as Appendix "B").

7. I stated to the Court that I was appearing solely for the purpose of contesting the jurisdiction of the Orange County Superior Court to entertain the proceedings before it. I was then informed by Deputy District Attorney ORETTA D. SEARS, that no complaint, either civil or criminal, had been filed in the Orange County Superior Court, and that the document entitled "Application for Order to Show Cause and for a Temporary Restraining Order" filed in the Superior Court was not in connection with any pending matter, but rather constituted the equivalent of an application for a search warrant to seize *all copies* of the film "Deep Throat," and that the Temporary Restraining Order restraining exhibition of the film "Deep Throat" at Plaintiffs' theatre was issued under the "inherent power of the Superior Court."

8. As appears from the papers filed in the Orange County Superior Court, attached hereto as Appendix "A", Defendant HICKS cites no statutory or decisional authority for the bringing of such extraordinary proceedings, and indeed, there is none. There is no authority in California law giving jurisdiction to any California court to enjoin, temporarily or permanently, the exhibition of a motion picture film alleged to be obscene. The only authority is to the contrary. See *Harmer v. Tonylyn Productions,* 23 C.A. 3d 941, 100 Cal.Rptr. 576.

9. Nor is there any authority permitting application for a search warrant to seize all copies of an allegedly obscene film. The only legal question properly before a court asked to issue a search warrant for the seizure of alleged obscenity is whether or not there is *probable cause* to believe the matter obscene. California Penal Code §1525; ***Monica Theatre v. Municipal Court,*** 9 C.A. 3d 1, App., 88 Cal.Rptr. 71. The decision of the United States Supreme Court in ***Heller v. New York,*** 93 S.Ct. 2789, emphasizes again that the Constitution prohibits prior restraint of freedom of ex-

pression before a final judicial determination of obscenity. Such final judicial determination of obscenity cannot be had in a proceeding which is nothing more than an application for a search warrant, particularly where, as here, there is no action even pending in the Superior Court, either criminal or civil.

10. In addition to the utter lack of authority for the Superior Court proceedings initiated by Defendants, the said proceedings are grossly and flagrantly unconstitutional. At the time Defendants sought a Temporary Restraining Order preventing any exhibition of the film "Deep Throat" at Plaintiffs' theatre, and sought an Order to Show Cause why all copies of the film should not be seized, Defendants had already seized four complete prints of the film, thereby preventing its further exhibition at Plaintiffs' theatre. It is obvious, therefore, that the initiation of the Superior Court proceedings by Defendants was not for "the bona fide purpose of preserving [the film] as evidence in a criminal proceeding" (*Heller v. New York*, 93 S.Ct. at 2794), since Defendants already had seized four complete prints of the film—three more than the Constitution permits.

11. From all of the foregoing, it is plain that unless this Court issues a Temporary Restraining Order preventing further seizures of additional prints of the film "Deep Throat" from Plaintiffs' theatre, Defendants intend to and will continue seizing any and all prints of the film "Deep Throat" that Plaintiffs may be able to obtain in order to completely halt its exhibition in Orange County before there has been any final judicial determination that the film is or is not obscene.

* * *

(b) Affidavit of Edward Bailey [R. pp. 30-34].

Filed November 29, 1973

EDWARD BAILEY, being first duly sworn, deposes and says:

1. I am the manager of the Pussycat Theatre, Buena Park, located at 6177 Beach Boulevard, Buena Park, California.

2. On the 23rd of November, 1973, the film "DEEP THROAT" commenced a scheduled exhibition at the said theatre. On the said date, the theatre opened at 12 Noon and the film "DEEP THROAT" commenced showing at approximately 12:33 P.M.

3. Approximately 10 minutes after the commencement of the said exhibition and at about 12:55 P.M., on the said date, four members of the Buena Park Police Department's Vice Squad [Sgt. Richard Haufdal, Sgt. Arthur Fontecchio, Daniel Harrison and a Captain whose badge number is 315, but whose name I do not know] arrived at the theatre, gaining entrance without paying admission.

4. At the completion of the first showing of "DEEP THROAT", at or about 1:35 P.M., I observed the four police officers leave the theatre and observed them speaking to a person who I believe to be a Municipal Court judge. Shortly thereafter, the officers approached me and showed me a copy of a search warrant providing for the seizure of the following:

> "All reels of 35 MM film and canisters holding same, for the film entitled 'Deep Throat.' Items to be seized include, but are not limited to: all posters, signs, advertisements, or other writings which promote, advertise, etc., the viewing or contents of the above-described film. All documents,

papers, bills, receipts, business records, directives, memorandums, etc., tending to show what persons are responsible for the promotion, management, exhibition, or ordering of the above-described film."

A true and correct copy of the said search warrant is attached hereto as Appendix "A".

5. Purportedly acting under the said search warrant, Officer Fontecchio advised me that he was required under the search warrant to seize all monies in the cash drawer, and instructed me to turn over the said funds in the cash drawer. Pursuant to the instructions of the said officer, I delivered to him the sum of $305.00. Still purportedly acting under the said search warrant, the officer seized an assortment of documents and four reels of film which constituted the film "DEEP THROAT".

6. Being of the view that, under the rulings of the United States Supreme Court, the police were without authority to seize more than one print of the same film, the threatre exhibited a second print of the film "DEEP THROAT". The said exhibition commenced at about 2:15 p.m.

7. At or about 2:52 p.m., the same vice squad officers again entered the said theatre. At that time, Officer Fontecchio asked me if "DEEP THROAT" was playing. Upon my giving him an affirmative answer, he advised me that the officers would have to view the film again but that he wasn't sure whether or not they would confiscate the print then showing.

8. The officers remained at the theatre until approximately 3:30 p.m. Subsequently, at about 4:37 p.m., the vice squad officers returned and seized the print

of "DEEP THROAT" which was then being exhibited at the theatre. At the same time, the police seized from the cash drawer the sum of $159.00. After seizing the said $159.00, Officer Fontecchio asked me if there were additional funds in the safe on the premises. I answered in the affirmative. After seizing the said film and monies, the police left the premises at or about 4:55 p.m.

9. Prior to 7:15 p.m., the theatre obtained a third print of the film "DEEP THROAT" and commenced showing the said print, at or about 7:15 p.m. At about 7:30 p.m., the police officers arrived. Approximately 30 minutes thereafter, two of the police officers left, advising me that they were going to see if they could find a judge to obtain his signature on a search warrant. At about that time, one of the officers stationed himself in the box office, purportedly to see that no money was removed from the premises. Shortly thereafter, a uniformed police officer, Officer Provost, came to the theatre and sat in the box office to see that no money left the premises.

10. Prior to the time Officer Fontecchio left, he told me that the next time he returned he would probably have an order to seize all monies in the safe. He advised me that if I did not have a key to the safe when he returned, the officers would either have to force the safe open or obtain a locksmith to pick the lock.

11. At or about 9:10 p.m., Officers Haufdal and Harrison advised me that Officer Fontecchio was still looking for a judge to sign a search warrant.

12. At about 11:05 p.m., Officer Fontecchio came to theatre with a new search warrant, pursuant to

which he seized the third print of "DEEP THROAT". At that time, Officer Fontecchio advised me that he was going to seize all monies on the premises, including the monies in the box office, the cash register at the concession stand and the money in the safe. He asked me whether I had a key to the safe, and upon my reply that I did not, Officer Haufdal asked me if I knew the telephone number of the locksmith used by the company to change the locks or combination on the safe. I advised him of the name of the locksmith that we used and he advised me that he was going to call them to get the safe open. At about 11:45 p.m., the locksmith arrived and opened the safe. Officer Haufdal took the money out of the safe and placed it on the table, where it was counted. In all, the police seized the sum of $4,082.33.

13. The police officers left at approximately 12:30 a.m., taking with them, in addition to the money, the third print of "DEEP THROAT".

14. Following the third seizure of a print, as aforesaid, patrons at the theatre became very upset, demanding a refund. Upon being advised by the police that they (the police) had confiscated the money, they were told to line up at the box office where they would all be taken care of in due time. In all, the theatre issued approximately 400 refund passes to patrons who had been denied the opportunity of viewing the film they had paid to see. There were no further performances of the film on November 23, 1973.

15. On Saturday, November 24, 1973, the first exhibition of the film "DEEP THROAT" began at 12:33 p.m. Three vice officers [Haufdal, Harrison and Fontecchio] returned to the theatre at 4:15 p.m. and informed me that they were going to view the film. Officer Fontecchio left the theatre after the film had run, stating that he had to get a signature.

16. Officer Fontecchio returned at approximately 5:55 p.m., and he and the other two officers entered my office. Officer Fontecchio showed me a copy of another search warrant. Officer Fontecchio directed me to turn over to him all money on the premises, and I did so. The cash present totalled $197.18, and included receipts from the sale of concessions, such as soda pop, candy and popcorn. I told Officer Fontecchio that I needed $25.00 with which to open the theatre the next day. He stated that the search warrant did not allow him to differentiate among the monies on the premises and he therefore refused to permit me to retain $25.00.

17. Before leaving the theatre, Officer Fontecchio asked me if we were going to bring in another print of the film "DEEP THROAT". I stated that I didn't know. He then stated that he hoped the theatre did not bring in another print, because he wanted to stay home on Sunday and watch the football game. The officers left the theatre with the cash, two advertising posters, one schedule of performances and four reels containing a full copy of the film "DEEP THROAT".

18. After the officers left the theatre, the theatre was closed to the public, thereby cancelling the scheduled performances for the remainder of the day. Four such performances had been scheduled for that day.

19. The theatre remained closed to the public all day Sunday, November 25, 1973, and through the afternoon on Monday, November 26. Eight performances of the film had been scheduled for Sunday and three performances through Monday afternoon.

* * *

(c) Affidavit of Carl Schmidt.

Filed November 29. 1973 [R. p. 27]

CARL SCHMIDT, being first duly sworn, deposes and says:

1. I am the chief projectionist for the Pussycat Theatre, Buena Park.

2. On Friday, November 23, 1973, after I had projected the first showing of the film "DEEP THROAT", Vice Officer Harrison came into the projection booth and asked me to remove the film and give it to him. I complied.

3. Later that afternoon, during the second exhibition of the second print, Officer Harrison again entered the projection booth and demanded that I stop the showing and turn over to him the full print of the film. I did so. I asked Officer Harrison whether they were going to seize every print of the film "DEEP THROAT" that might be exhibited at the theatre. He replied,

> "Yes, we're going to seize every print because this is Orange County."

When I asked this question of Officer Harrison, I told him it was my understanding that the officers legally could seize only one print of any particular film.

4. I have inspected three of the four full prints of the film "DEEP THROAT" which were seized. As to the three full prints that I inspected, I know that all three were identical to one another.

* * *

(d) Affidavit of Richard W. Witte.

Filed November 29, 1973 [R. p. 28]

RICHARD W. WITTE, being first duly sworn, deposes and says:

1. In the course of my employment, I have examined all four complete prints of the film "Deep Throat" which were exhibited at the Pussycat Theatre in Buena Park on November 23 and 24, 1973. All of the four complete prints are identical.

* * *

(e) Affidavit of Donna Stockdale [R. p. 29].

Filed November 29, 1973

DONNA STOCKDALE, being first duly sworn, deposes and says:

1. I am a cashier at the Pussycat Theatre, Buena Park.

2. On Friday, November 23, 1973, and Saturday, November 24, I was on duty while all four prints of the film "DEEP THROAT" were seized. Following each seizure, it was my duty to explain to customers, many of whom were upset and angry, that the theatre could not refund their money which they had paid to see the film, because the police had confiscated all of the cash at the theatre. Virtually all of the many hundreds of people who entered the theatre on Friday and Saturday did demand their money back, and I had to give each of them the above explanation as to why I could not do so.

* * *

(f) Affidavit of David M. Brown [R. pp. 40-43].

Filed November 29, 1973

DAVID M. BROWN, being first duly sworn, deposes and says:

1. I am an attorney duly admitted to the practice of law in the State of California and am a member of the firm of FLEISHMAN, McDANIEL, BROWN & WESTON, a Professional Corporation, attorney of record for Plaintiffs herein.

2. As appears from the accompanying Affidavits of EDWARD BAILEY, CARL SCHMIDT, DONNA STOCKDALE and DONALD J. HALEY, some of the Defendants in this action, specifically CECIL HICKS, District Attorney for Orange County and DUDLEY D. GOURLEY, Buena Park Chief of Police, and Buena Park Vice Officers FONTECCHIO, HAFDAHL and others, have commenced a campaign of harassment against Plaintiffs' theatre in Buena Park with the clear and announced objective of preventing the exhibition of the film "Deep Throat" at the theatre by seizing every print of the film the theatre has exhibited.

3. As appears from the aforesaid Affidavits, the film "Deep Throat" commenced exhibition to the public on Friday, November 23, 1973. Thereafter, on November 23 and 24, all four complete prints of the film exhibited at the theatre were seized in succession by officers of the Buena Park Police Department. The seizures were accompanied by the statement of Buena Park Police Officer HARRISON that "We're going to seize every print because this is Orange County."

4. The seizures of four prints of the same film in the space of two days has halted abruptly the exhibition of the film "Deep Throat" at Plaintiffs' theatre. In addition to seizing the four prints of the film, the officers seized all cash on hand at the theatre in the total sum of approximately $5,000.00, thereby preventing cash refunds to Plaintiffs' customers who had paid to see the film and were unable to do so because of the repeated seizures. Further, the officers seized a roll of film out of a camera being used by a publicist employed by Plaintiffs who was attempting to photograph some of the activities.

5. The conduct of the Defendants as revealed in the accompanying Affidavits is in clear violation of the First, Fourth and Fourteenth Amendments to the United States Constitution. In *Heller v. New York*, 93 S. Ct. 2789, the Supreme Court made it crystal clear that the Constitution prohibits "seizing films to destroy them or to block their distribution or exhibition" (93 S.Ct. at 2794). In *Heller*, the Court held that the First Amendment does not prohibit the seizure, pursuant to a search warrant issued *ex parte* and upon probable cause, of "a single copy of a film for the bona fide purpose of preserving it as evidence in a criminal proceeding, particularly where . . . there is no showing . . . that the seizure of the copy prevented continuing exhibition of the film." (93 S.Ct. at 2794-2795). But the Court emphasized that the State's power to seize a single copy of a film for use as evidence in a criminal proceeding is not a power to prevent the continuing exhibition of the film pending a final judicial determination of its alleged obscenity.

Indeed, the Court held that where seizure of even a *single* print of a film prevents its continued exhibition at a theatre, courts must permit the seized film to be copied and returned to its owner in order to avoid prior

restraint of expression. (93 S.Ct. at 2795). In short, the State's interest in preserving evidence for criminal prosecution permits nothing more than the seizure of a single print of any given film being exhibited at a theatre.

6. The attempt by the Defendants herein to use the power of search and seizure to halt the exhibition of the film "Deep Throat" before there has been a final judicial determination of its alleged obscenity, not only constitutes a forbidden prior restraint of freedom of expression, but constitutes bad faith law enforcement as well. These Defendants are well aware that multiple seizures of prints of the same film from a single theatre is unlawful. In *Miranda v. Bahner,* U.S.D.C. C.D. Cal. Civ. No. 73-195-HP, the Honorable DAVID W. WILLIAMS issued an Order on March 5, 1973, commanding these same Defendants to return to Plaintiffs one of two prints of a film entitled "Marital Aids and Stimulators" that Defendants had seized. A copy of the said Order is attached hereto as Appendix "A".

7. Accordingly, Plaintiffs seek a Temporary Restraining Order commanding Defendants to return to Plaintiffs forthwith, three complete prints of the film "Deep Throat", thereby permitting Defendants to retain one complete print of the film for possible evidentiary use. Such an Order would in no way halt, handicap, or hinder any possible state criminal prosecution. The Temporary Restraining Order requested would also enjoin the Defendants from seizing additional prints of the film "Deep Throat".

* * *

(g) Affidavit of Donald J. Haley [R. pp. 47-48].

Filed November 29, 1973

DONALD J. HALEY, being first duly sworn, deposes and says:

1. I am employed as a publicist for the Plaintiffs herein.

2. On Friday, November 23, 1973, at approximately 1:45 p.m., I was present on the sidewalk outside of the Pussycat Theatre, Buena Park.

3. At that time, I had a camera in my hand and was attempting to take photographs of a person that I believed to be a judge in the process of signing a document that I believed to be a search warrant. A vice officer for the City of Buena Park blocked my view with his back. I then moved to another position and another vice officer blocked my view and told me to "Get out of here." I then heard several voices speaking in rapid succession. One man stated, "Get that camera, dump the film." A vice officer then took my camera, handed it on someone else, and returned it to me a minute or so later.

4. I was then told that I had already violated the law and was subject to arrest (although, in fact, I was not arrested). I was then ordered to open the camera and to remove the film. I did so and handed it to a vice officer who gave me his card containing the name Sgt. Dick Hafdahl, Buena Park Police Department, Vice Narcotics Bureau. On the back of the card was a handwritten receipt for 1 roll Kodacolor II film. A copy of the front and back sides of the card are attached hereto as Appendix "A". The film has not been returned to me.

5. I was then required to produce identification by the vice officers, and I complied by giving them my Publicists Guild identification card.

Excerpts From Affidavits in Opposition to Application for Temporary Restraining Order.

(a) Affidavit of Judge John H. Smith, Jr. [R. pp. 71-72].

Filed December 3, 1973

JUDGE JOHN H. SMITH, JR., being first duly sworn, deposes and says:

1. I am a Judge of the Municipal Court in and for the Central Orange County Judicial District.

2. On November 23, 1973, I viewed the movie "Deep Throat" at the Pussycat Theater at 6177 Beach Boulevard, City of Buena Park.

3. At about 1:30 p.m., November 23, Mr. John Anderson, a Deputy District Attorney for the County of Orange, and I met with police officers on the sidewalk in front of the theater where I signed a search warrant instructing police officers to seize the film and all ticket office receipts as further evidence of the commission of an unlawful act.

4. At about 4:20 p.m., on November 23, 1973, I signed another warrant instructing the Buena Park Police Officers to seize another copy of the film "Deep Throat" and all monies contained in the ticket booth cash drawer.

5. At about 10:00 p.m., after having viewed the movie "Deep Throat" again, I signed another warrant instructing the officers to seize this copy of "Deep Throat" and all monies held in the ticket office to that date.

6. On Saturday, November 24, 1973, I signed a 4th search warrant instructing the officers to seize an additional copy of the film "Deep Throat" and any proceeds of ticket sales held up to that time.

7. At this time I am holding four copies of the film "Deep Throat" and funds slightly exceeding $5,000. Said films and funds are in my custody and control.

8. While at the theater on November 23, at 1:30 p.m., and while receiving the warrant and affidavit on the sidewalk in front of the theater, I ordered police officers to seize the film from a camera being used by an individual to take photographs of myself and others who were performing a judicial function.

* * *

(b) Affidavit of Arthur Fontecchio [R. pp. 73-76].

Filed December 3, 1973

ARTHUR FONTECCHIO, being first duly sworn, deposes and says:

1. I am employed as a detective of the Buena Park Police Department, currently assigned to the Vice-Narcotics Division.

2. On Tuesday, November 20, 1973, Detective Harrison, Sergeant Hofdahl and I viewed the movie "Deep Throat" at the Hollywood Pussycat Theater.

3. On Wednesday, November 21, 1973, I prepared an Affidavit and went to the Orange County District Attorney's Office where I discussed the matter with Deputy District Attorney John Anderson. As a result, a search warrant and affidavit in support was prepared by Mr. Anderson and arrangements were made for a judicial review of the film if it was brought to the Buena Park Pussycat Theater as advertised.

4. On Friday, November 23, 1973, at approximately 12:30 p.m., Mr. Anderson and the Honorable Judge John Smith responded to the Pussycat (C.T. p. 73) Theater in Buena Park for the purpose of viewing the film to determine if it was the same as the film viewed by us at the Pussycat Theater in Hollywood. After viewing the film and determining that it was essentially the same as the film viewed by the officers in Hollywood, I left the viewing area of the theater to await the conclusion of the movie and the arrival of Judge Smith and John Anderson.

5. At approximately 1:30 p.m. I contacted Judge Smith and Deputy District Attorney John Anderson as they exited the front of the theater and Judge Smith reviewed the Affidavit and Search Warrant and signed same.

6. While the Judge was reviewing the Affidavit, a male white adult identified as Donald Haley began taking photographs of the Judge, myself, Sergeant Hofdahl, Detective Harrison and John Anderson. Judge Smith ordered Detective Harrison to seize subject Haley's film, to which order Harrison complied.

7. After receiving the warrant signed by Judge Smith, I served same on Mr. Edward Lee Bailey, manager of the theater. After he read the original search warrant signed by the judge, I gave Mr. Bailey a copy of said warrant. As the officers left the theater Mr. Bailey stated another copy of the film would be shown as soon as he could obtain one.

8. At approximately 3:00 p.m. the above officers returned to the Pussycat Theater for the purpose of viewing the aforementioned film which was being shown again. It was my intention to commence issuing citations for each additional showing of the film, as is our current procedure, unless the film proved to be a different version, as had happened to me in the past at that theater.

9. After viewing the movie "Deep Throat" in its entirety I observed that this copy was different than the copy viewed by Judge Smith in the following ways: the second copy had an additional scene of sexual intercourse, and oral copulation; obvious changes in lighting, sound and editing.

10. As a result of these changes I prepared an Affidavit in Support of Search Warrant with the observed changes added to same. I responded to Judge Smith who reviewed the Affidavit and Search Warrant at approximately 4:20 p.m,. November 23, 1973, and signed same authorizing seizure.

11. At approximately 4:30 p.m. the above officers again returned to the Pussycat Theater and served the second warrant on Edward L. Bailey. After seizing the items listed in the return to the second warrant the officers left the theater. Prior to leaving Bailey stated another copy would be shown if he was able to obtain same.

12. At approximately 7:45 p.m. that night the above officers returned to the Pussycat Theater and observed that another copy of "Deep Throat" was being shown. The officers again viewed the entire movie and I observed the following changes. The

third copy of "Deep Throat" consisted of one (1) act of oral copulation and one (1) act of sexual intercourse, obvious lighting, sound and editing changes not shown in the copy viewed by Judge Smith. The officers also detected differences in editing between the second and third films. Due to these changes I prepared another Affidavit in Support of Search Warrant listing the changes and again made contact with Judge Smith at approximately 9:00 p.m. and reported the differences to him.

13. After reviewing the third Affidavit and Search Warrant and signing same, Judge Smith decided he would like to again view the film. The officers returned to the theater with Judge Smith, with him entering separately at approximately 9:15 p.m. I sat next to the Judge and pointed out the changes observed by the officers and at approximately 10:00 p.m. Judge Smith ordered me to serve the warrant and I complied. I served same on Edward L. Bailey who again read the entire warrant (original) and I gave him a copy of the warrant.

14. There were changes in warrants 1, 2, and 3 as to the seizure of monies in the cash drawers and safe because Judge Smith had ordered me to seize the money as evidence and to force the theater safe open if necessary. On seizures one and two, monies seized by the officers were taken from the cash drawer only. On seizure number three monies were seized from the cash drawers and from the safe with the use of a locksmith to open the safe.

15. On Saturday, November 24, 1973, at approximately noon, the officers learned that "Deep Throat" would again be showing. At approximately 2:30 p.m., myself, Harrison and Hafdahl responded to Judge Smith's residence and turned over all items seized on November 23, 1973, and advised him that the above film would again be showing.

16. The officers again viewed the film and again noticed changes in this film from prior films in sound, lighting and editing. Another Affidavit in Support of Search Warrant and Search Warrant which was reviewed by Judge Smith and signed.

17. On November 24, 1973, at approximately 6:00 p.m. the officers returned to the Pussycat Theater and I served the fourth Search Warrant signed by Judge Smith on Edward Bailey, obtaining the items listed in the return to that warrant.

18. It is my opinion and belief that the management of the theater was able to show at least four complete showings of the film while the officers were obtaining new warrants on Friday, November 23, 1973, and on Saturday, November 24, 1973, the management was able to show at least four complete showings and were able to keep all monies involved due to making bank drops prior to and between the seizures.

* * *

(c) Affidavit of Thomas R. Hofdahl [R. pp. 77-80].

Filed December 3, 1973

THOMAS R. HOFDAHL, being first duly sworn, deposes and says:

1. I am employed as a Sergeant of the Buena Park Police Department, currently assigned to head the Vice-Narcotics Division.
2. On November 20, 1973, myself, Detective Fontecchio and Detective Harrison viewed the movie "Deep Throat" at the Pussycat Theater on Santa Monica Boulevard in the City of Hollywood.
3. Detective Fontecchio prepared an Affidavit in Support of Search Warrant and Search Warrant under the direction of Mr. John Anderson, Orange County District Attorney's office. This took place on November 21, 1973, in anticipation of the movie, "Deep Throat" being shown at the Pussycat Theater, 6177 Beach Boulevard, Buena Park, California.
4. Arrangements were also made that day for Mr. John Anderson and Judge John Smith, Central Orange County Municipal Court to meet with the above named officers about noon, Friday, November 23, 1973. This meeting took place at the Buena Park Police Department where Mr. Anderson was given $20.00 Buena Park city funds to pay admission into the theater for himself and Judge Smith.
5. The above officers entered the theater at about 12:45 p.m. and viewed about 45 minutes of the movie, "Deep Throat" which was observed to be essentially the same as that viewed in Hollywood, the movie the affidavit was based upon.

6. At about 1:30 p.m., November 28, 1973, the above officers met with Mr. Anderson and Judge Smith on the sidewalk in front of the theater where Judge Smith signed the search warrant after Mr. Anderson wrote, "Money contained in the ticket booth and specifically for a $20.00 bill, serial number B 08574869B" on line 17, page 2 of search warrant. The ticket office receipts were being seized as evidence of an unlawful act and to secure the marked money. The above quote was also entered on the Affidavit in Support of Search Warrant by Mr. Anderson, line 6, page 2 (attachment F).
7. At about 1:35 p.m., the above officers re-entered the theater to serve the search warrant. I instructed Det. Harrison to go to the projection room and seize the film and I observed Det. Fontecchio hand Mr. Edward Bailey, manager of the theater, the original copy of the search warrant and leave a xerox copy of same. I told Mr. Bailey the warrant called for seizure. Mr. Bailey removed the money from the ticket booth cash drawer which was counted by he and Det. Fontecchio ($305.00). Det. Fontecchio wrote an inventory of items seized which was written on the reverse side of the search warrant given to Mr. Bailey.
8. Mr. Anderson had instructed us to view every subsequent copy of the movie "Deep Throat" and if we detected differences between any copies to seize them also with a new search warrant. If the films were identical we would not seize them but issue citations for every day of showing just as we had done with prior films.

9. We viewed another copy of the film at about 3:00 p.m. and went to Judge Smith. We had detected an additional act of sexual intercourse not present in the first edition. Judge Smith signed a second search warrant and supporting affidavit at about 4:30 p.m., November 23, 1973. This was signed after *I* had written, "Money contained in the ticket booth cash drawer," on line 17, page 2 of the search warrant and line 6, page 2 of supporting affidavit (attachment G).

10. This warrant was served at about 4:30 p.m. with Det. Harrison seizing the film and Det. Fontecchio showing Mr. Bailey the original and leaving another copy.

11. At about 7:45 p.m., November 23, 1973, we again entered the theater and sat through a complete showing of the film "Deep Throat" detecting still again differences in editing.

12. We went back to Judge Smith and reported seeing differences. The judge signed a third search warrant and affidavit at 9:00 p.m., November 23, 1973, after Det. Fontecchio had written, "All monies on premises received in cash drawers or safes at above locations" at the direction of Judge Smith (attachment H). The judge also stated he would like to view the movie again. We drove Judge Smith to the theater and gave him $5.00 in Buena Park city funds for admission. We entered the premises separately. Det. Fontecchio sat next to the judge and pointed out differences he had seen.

13. At about 10:00 p.m., Det. Fontecchio told me the judge had said to serve his third warrant now. This

was done with Det. Harrison seizing the film and Det. Fontecchio presenting Mr. Bailey with the original and leaving a copy. At the order of Judge Smith, I arranged for a locksmith to open the bottom portion of the safe. $4,082.33 was seized in total. This concluded the activities of Friday, November 23, 1973. (C.T. p. 79)

14. On Saturday, November 24, 1973, at about 2:45 p.m., the above officers responded to Judge Smith's residence and left him everything we had seized the day before, including all films, money, posters and schedules. Judge Smith also signed a fourth search warrant and affidavit at 4:00 p.m. (attachment I). This warrant was served at about 6:00 p.m. with your affiant seizing the film. Det. Fontecchio presented Mr. Bailey with the original and left a copy. $197.18 was also seized. The fruits of the seizure were delivered to Judge Smith on November 26, 1973.

15. As near as your affiant can determine the theater did have at least four complete showings of the film "Deep Throat" while officers were viewing same and obtaining search warrants. This is on November 23, 1973. On November 24, 1973, they had at least four more additional showings which were completed.

16. On November 23, 1973, at the first seizure our search warrant called for retrieval of a certain $20.00 bill which we could not locate. Mr. Bailey advised us he had taken a large amount of money to the Bank of America and deposited same. All the $20.00 bills had gone to the bank with that deposit. On November 24, 1973, Mr. Bailey told

us he had been ordered by his superiors to make as many bank drops as possible so we would not seize too much money.

17. To the best of my information and belief, the theater was able to complete some eight showings of the film and to make bank deposits of the money received for those showings, with no theater patrons demanding refunds on those occasions.

18. On each of the four occasions that a copy of the film was seized, it had been determined by myself and the other officers that the copies were different from those previously seized. Had we observed any copy which appeared substantially identical to previous copies, it was my intention to cease any further seizures and allow the film to continue its run while our department followed the current procedure of issuance of citations for subsequent showings.

* * *

(d) Affidavit of John F. Anderson.

Filed December 3, 1973 [R. pp. 84-87]

JOHN F. ANDERSON, being first duly sworn, deposes and says:

1. I am an attorney duly admitted to the practice of law in the State of California and am a Deputy District Attorney for the County of Orange.

2. I am currently assigned to the Writs and Appeals Section of the District Attorney's Office, and in that capacity, since July 1973, have been assigned as the deputy primarily responsible for the prosecution of violations of the California Penal Code

provisions relating to pornography, obscenity, and lewdness.

3. On July 31, 1973, I first had occasion to assist members of the Buena Park Police Department in actions taken against the Pussycat Theater located in their city.

4. On August 1, 1973, I prepared the search warrant for the seizure of a film entitled "Making the Blue Film". On that occasion I instructed Detectives Fontecchio and Hofdahl that pursuant to the mandates of the United States Supreme Court as set forth in *Heller v. New York,* they were to seize only one copy of the film. The officers were further advised that subsequent showings of a copy of the film were to be allowed with citations being issued in lieu of arrests and/or further seizures.

5. On August 13, 1973, I prepared a second search warrant for the seizure of the same film because officers who had been issuing citations in the interim period had noted that a different version was being shown which included additional scenes of sexual activities not present in the first film.

6. On August 1, 1973, Judge James O. Perez of the North Orange County Municipal Court had viewed the film prior to signing the search warrant which was served on that date. The same judge signed the search warrant on August 13, 1973, based on the affidavit in support of the warrant in which the differences between the two copies of the film were described, sworn and subscribed to by the officers.

7. On August 14, 1973, I spoke with Attorney John Weston of the law firm of Fleishman, McDaniel,

Brown, and Weston, who represented the Pussycat Theater then, as now. *Mr. Weston advised that there are generally two versions of each of the movies shown at the Pussycat Theater, one "hard core" version and one "soft core" version.* He explained that the normal procedure for the theater is to display the hard core version first, and if that is seized, to then display the softer version. Mr. Weston related that apparently the theater chain had erred in which version was shown first and the harder version seized on August 13, 1973, did indeed contain additional scenes of sexual activities.

8. No court action of any type has been taken to date by the theater to obtain a return of either copy of that film.

9. In every other case since July 1973, invoking a seizure of a film from the theater, the Buena Park Police Officers have seized only one (C.T. p. 85) copy and have allowed the display of the movie to continue, and have issued citations for violation of California Penal Code Sections 311.2 and 311.5 in lieu of arresting theater personnel. This has been done pursuant to my advice to the officers that this was the legally preferred method.

10. On November 23, 1973, when the first seizure of "Deep Throat" was made at the Buena Park Pussycat Theater, I was present at the theater when Judge John H. Smith Jr. viewed the film and signed the first search warrant. (Attachment F.) At that time I advised the members of the Police Department to continue viewing any additional showings of the film "Deep Throat" but to make

no further seizures and use the normal citation procedure unless they detected differences in subsequent copies of the film as had happened to them in the "Making the Blue Film" case. They were advised to note and add the difference, if any, to any subsequent search warrant affidavit.

11. I was not present at any subsequent showings or seizures at the Pussycat Theater.

12. On Monday, November 26, 1973, Oretta Sears of this office prepared an Application for Order to Show Cause and for a Temporary Restraining Order, which was granted by the Honorable Byron K. McMillan, Judge of the Superior Court, County of Orange. At about noon that same date a copy of the Application and the original Order to Show Cause and Temporary Restraining Order were served on the Pussycat Theater by Detective Hofdahl. (Attachment J.)

13. Pursuant to the order, (commencing at line 25, page 2, thereof) regarding a speedy hearing, *Attorney David M. Brown noticed my officer to be in Department 21 of the Superior Court* (Judge McMillan's court) at 2:30 p.m.

14. At 2:30 p.m. that same date a hearing was commenced on the record before Judge McMillan with counsel for both parties present.

15. On Tuesday November 27, at 10:00 a.m., Judge McMillan viewed the film "Deep Throat". I was sworn and testified that it was the same film that had been viewed by myself and Judge Smith at the Pussycat Theater on November 23, 1973. Dr. Donald A. Sears was sworn and testified as

follows: that he is an expert on redeeming social value as it relates to the obscenity statutes in effect in California, that he had viewed the same showing of "Deep Throat" as Judge McMillan and determined in his opinion that it was utterly without redeeming social value, and gave his reasons therefore.

16. Following the testimony of the witnesses, Judge McMillan made a ruling based on his viewing and the testimony that "Deep Throat" was obscene beyond any reasonable doubt, and issued an Order of Seizure After Adversary Hearing. (Attachment K.)

17. The Order of Seizure was served on defendant (plaintiff in this action) Pussycat Theater, by members of the Buena Park Police Department, at the direction of Judge McMillan, on Tuesday, November 27, 1973.

18. At the time of the *serving of the Order, no copies of the film, "Deep Throat" were found to be at the theater and no seizure was made.* A copy of the order was left with the theater manager Edward L. Bailey and he was advised by the officers serving the order that they would make a seizure pursuant to the order if, in fact, a copy were to be found showing at the theater.

* * *

(e) Declaration of Cecil Hicks.

Filed January 29, 1974 [R. pp. 330-331]

CECIL HICKS deposes and says:

That he now is and at all times mentioned in Plaintiff's Complaint for Damages and Injunction, pursuant to the Civil Rights Act, has been the duly qualified and acting District Attorney of the County of Orange. As District Attorney, he is empowered and required by State law to prosecute any and all offenses arising upon violation of the laws of the State of California, occurring within the territorial limits of Orange County. That violations of California Penal Code Sections 311.2 and 311.5 are misdemeanor offenses.

That the records of his office indicate that two prosecutions were initiated against Plaintiff herein for violation of Penal Code Sections 311.2 and 311.5. One contained two separate counts and the other five separate counts.

That Declarant has not conspired with anyone, or at all, nor has he entered into any agreement with anyone, or at all, to enforce the provisions of Sections 311.2 and 311.5 of the California Penal Code, or any other section thereof, or any law, in any illegal or wrongful or arbitrary manner, or for any illegal or wrongful purpose, or for the purpose of denying to anyone any civil right or any right guaranteed under the Constitution of the United States or any other right guaranteed or provided for by any law.

That Declarant has not threatened Plaintiffs, or any of them, with further or any prosecutions. In this connection, however, Declarant states that it is his intention, and he will to the best of his ability, fulfill the duties of

his office including the prosecution of misdemeanor offenses within the jurisdiction of his office.

Declarant certifies that the above statements are true of his own knowledge and that if sworn as a witness, he could testify competently thereto.

* * *

(f) Affidavit of Daniel Harrison.

Filed November 29, 1973 [R. pp. 46-47]

DANIEL HARRISON, being first duly sworn, deposes and says:

1. I am employed as a Detective of the Buena Park Police Department, currently assigned to the Vice-Narcotics Division.

2. I was present with Sergeant Hofdahl and Detective Fontecchio at each incident to which they have referred in their affidavits; my function being to make the physical seizures of the films in the projection booth pursuant to the orders of Sgt. Hofdahl.

3. At the time of the first seizure on Friday, November 23, 1973, at about 1:30 p.m., while Judge Smith was reviewing the first search warrant and affidavit on the sidewalk in front of the theater, a Mr. Donald Haley commenced taking pictures of the judge, Deputy District Attorney John Anderson, and the officers present. Judge Smith ordered me to stop Mr. Haley's activities and obtain some identification from him and determine if he was a member of the press. Upon determining that he

was not a member of the press and was an employee of Pussycat Theater, Judge Smith ordered me to seize the film in his camera. I complied with the judge's order and left Mr. Haley a receipt for said film.

4. During the second seizure of the film on Friday, at about 4:30 p.m. I was the officer who went to the projection booth and physically seized the film. At that time I had a conversation with the projectionist, Carl Schmidt. I was told by Mr. Schmidt, "This is the filthiest movie I've ever shown," and he then said, "How come it's legal in L.A. County and not here?"

5. In response to Mr. Schmidt's question, I stated, 'Because of jurisdiction, this is Orange County." He also asked, "Are you going to let it play or are you going to take all of the copies?", to which I replied, "I don't know."

6. At no time did I state that, ". . . we're going to seize every print because this is Orange County."

7. Mr. Edward Bailey related to me that the theater did show the film "Deep Throat" in its entirety at least four times and that the profits were maintained by the theater by means of hourly bank deposits.

8. I have observed that pending further actions by the courts, the theater has ceased to show "Deep Throat" but is remaining open and is showing another film.

(g) Affidavit of Oretta D. Sears.

Filed January 29, 1974 [R. pp. 332-333]

ORETTA D. SEARS, being first duly sworn, deposes and says:

I am an attorney admitted to practice in the State of California and I am the Deputy District Attorney in charge of the Writs and Appeals Section of the Orange County District Attorney's Office. Pursuant to the duties of my position, I have sought an adversary hearing on the issue of obscenity in this matter and I have helped prepare the application for an order asking the Defendants to appear before the Superior Court for the purpose of such hearing. Thereafter, I appeared at the Superior Court hearing, presented evidence and argued the legal issues. Also, as part of my duties, I directed the obtaining of the four search warrants resulting in the seizure of four copies of the film; in each instance, after the first seizure. This was done because I had been informed that the copies shown differed from the first copy.

At all times I acted in conformance with what I believed to be the duties of my position and in an honest effort to enforce the laws of the State of California and for no other reason.

* * *

Notification and Certificate (Three Judge District Court).

Filed December 28, 1973 [R. p. 180]

[Caption Omitted in Printing]

TO: THE HONORABLE RICHARD H. CHAMBERS, CHIEF JUDGE, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Pursuant to the provisions of 28 U.S.C. Section 2284, you are notified that the complaint now pending in the above cause involves, among other things, the enforcement, operation and execution of State statutes and seeks an injunction restraining the enforcement and execution of those statutes and of orders of a State court made (C.T. p. 180) pursuant thereto.

I certify that I have examined the complaint and that, in my opinion, the formation of a district court of three judges, as set forth in 28 U.S.C. Section 2284, is required.

IT IS ORDERED that the original of this Notification and Certificate be filed and that the Clerk forward true copies thereof by United States mail to Chief Judge Chambers and to all counsel who have appeared in this proceeding.

Order.

Filed December 28, 1973 [R. pp. 182-185]

[Caption Omitted in Printing]

This matter is before the Court on the application of plaintiff corporation, who operates a motion picture theatre known as the Pussycat Theatre in Buena Park, California, and plaintiff Miranda, who owns the land

on which the theatre is located, for a temporary restraining order. The temporary restraining order seeks to require defendants Cecil Hicks, District Attorney of the County of Orange, State of California, Oretta Sears, Deputy District Attorney of the same County, Dudley D. Gourley, Chief of Police of the City of Buena Park and City of Buena Park Police Officers Arthur Fontecchio, Richard Hafdahl and Daniel Harrison to return three of four prints of the film "Deep Throat" seized by certain of the defendants from plaintiff corporation's theater, to enjoin further seizures of additional prints that plaintiff corporation may show at its theatre and to return certain cash impounded at the time of the seizure of the above-noted prints pending hearing on a requested order to show cause seeking similar relief on a more permanent basis and the convening of a three-judge court pursuant to 28 U.S.C. Sections 2281 and 2284 to hear the claims raised in plaintiffs' complaint.

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1343(3) and (4) and 42 U.S.C. Section 1983.

The record before us shows that on November 23 and 24, 1973 law enforcement officers, executing validly issued search warrants on four separate occasions, seized prints of the film "Deep Throat" as well as display posters and cash receipts in connection with alleged separate violations by plaintiff corporation and others of California Penal Code Sections 311, 311.2 and 311.5, popularly known as the California Obscenity Statute.

Thereafter on November 26, 1973 defendant Hicks as District Attorney for the County of Orange applied to and obtained from the Superior Court of the State of California an order to show cause addressed to plaintiffs

and others as to why all copies of the film should not be declared obscene and plaintiffs and other respondents permanently enjoined from further exhibition of it. Adversary hearing on the order to show cause was noticed for and held on November 27 and 28, 1973 at which these plaintiffs and others appeared by counsel. The Superior Court, after viewing the film and taking other evidence, declared it obscene and ordered all copies found in plaintiff corporation's theater seized. This action was filed in this Court the next day, attacking on procedural as well as substantive grounds the actions of defendants and the State courts.

In our view plaintiffs have failed totally to make that showing of irreparable damage, lack of an adequate legal remedy and likelihood of prevailing on the merits needed to justify the issuance of a temporary restraining order which would require police officers, elected public officials and officers of the California courts to disobey the orders of those courts and would restrain the lawful enforcement of a State statute. The seizures complained of were made pursuant to warrants issued after a determination of probable cause by a neutral magistrate and, following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding was made available and utilized. Procedurally, therefore, the seizure was constitutionally permissible and no return of the film or other material seized is required. The temporary restraining order sought by plaintiffs is denied.

The substantive question of whether or not the challenged State statutes are unconstitutional and enforcement thereof should accordingly be restrained, and ancillary questions with respect thereto including the ap-

propriateness of abstention, may be heard and determined only by a district court of three judges under 28 U.S.C. Section 2281. Having determined that the constitutional question raised is not wholly insubstantial and is not, legally speaking, non-existent, that the complaint at least formally alleges (C.T. p. 184) a basis for equitable relief and that the case presented otherwise comes within the requirements of the three-judge statute even though the prayer seeks declaratory judgment only as to the constitutionality question, notification and certification in accordance with 28 U.S.C. Sections 2281 and 2284 will issue from this Court seeking appointment of a statutory three-judge court to hear and determine the cause.

Dated: December 28, 1973.

Lawrence T. Lydick
United States District Judge

Defendants' Answer to Complaint for Declaratory Judgment, Damages and Injunction.

Filed January 29, 1974 [R. pp. 215-219]

[Caption Omitted in Printing]

The defendants Cecil Hicks and Oretta D. Sears for answer to the complaint allege as follows:

* * *

Fourth Defense

By way of affirmative defense defendants Cecil Hicks and Oretta D. Sears affirmatively allege as follows:

* * *

I

On November 20, 1973 Officers of the Buena Park Police Department viewed a showing of the 35 mm film "Deep Throat" at the Pussycat Theater in Hollywood. The viewing was done in preparation for the opening of "Deep Throat" at the Buena Park Pussycat Theater.

II

On Friday, November 23, 1973 the film opened at the Buena Park location and was viewed by the Honorable Judge John H. Smith, Jr., of the Central Orange County Judicial District. Following the viewing, Judge Smith, based upon the affidavit prepared previously by Officer Fontecchio, and on the basis of his own viewing, found that there was probable cause to believe that the film "Deep Throat" was obscene and issued a search warrant ordering the seizure of the film. The film was seized that day at about 1:30 p.m. along with money, posters and other items listed in the return. (Certified copies of the search warrant, affidavit and return are attached labeled Attachment F.)

III

That same day, at about 4:30 p.m. another seizure was made of the copy of "Deep Throat" which was being shown. The seizure was made pursuant to a second search warrant, the affidavit of which stated that the second copy of the film in fact differed from that seen by Judge Smith in that there were additional scenes of sexual activities not present in the first film. (Certified copies of the affidavit, search warrant and return are attached and labeled Attachment G.)

IV

Later that day a third seizure was made, based on a third search warrant signed by Judge Smith, who had personally returned to the theater again to view the film. During this viewing Officer Fontecchio sat with the judge and pointed out differences between the copy being viewed and the previously seized copies. Judge Smith ordered Officer Fontecchio to seize the third copy of the film and further, specifically ordered the officers to seize all monies present in the theater, including any money in the safe. Pursuant to the judge's direct order, the officers called in a licensed locksmith who opened the floor safe of the theater, from which some $4,000 was seized. An affidavit by Judge Smith is attached and labeled Attachment A. (Certified copies of the search warrant, affidavit and return are attached and labeled Attachment H.)

V

On Saturday, November 24, 1973 the officers deposited with Judge Smith all items which had been seized pursuant to the three warrants. Also on that date they observed a fourth copy of the film "Deep Throat" which was being shown. The officers saw the film and noted that this fourth film was different from

the seized copies, they reported the differences to Judge Smith who issued a search warrant and a fourth seizure of the film took place. (Certified copies of the search warrant, affidavit and return are attached and are labeled Attachment I.)

On Monday, November 26, 1973 in the Orange County Superior Court the People of the State of California applied for and were granted a Temporary Restraining Order and Order to Show Cause *in re* a determination of obscenity, of the movie "Deep Throat". In its order to show cause the Superior Court of Orange County ordered defendant to appear and show cause five days later why all copies of the film should not be ordered seized as being obscene. The order further provided, however, that the hearing on the issue of obscenity could be had at the request of defendant at any time prior to the date scheduled, provided the court was free and the District Attorney was given one hour's notice. (Certified copies of the application and of the order are attached hereto and labeled Attachment J.) At defendant's request, at 2:30 p.m. on that day, a hearing was had in Department 21 of the Orange County Superior Court, the Honorable Byron K. McMillan, Judge Presiding, the judge who had issued the Order to Show Cause and Temporary Restraining Order.

VI

Attorney David M. Brown appeared at said hearing on behalf of the theater and plaintiffs named in this action and argued the lack of jurisdiction of the Orange County Superior Court to hold such a hearing. He filed with the Orange County Superior Court a short document entitled "Reservation of Federal Constitutional Questions" in which he stated "Defendants . . . reserve all federal constitutional claims for purposes of federal

jurisdiction." Judge McMillan, of the Orange County Superior Court, ruled that jurisdiction was present, at which time Mr. Brown refused to submit to the jurisdiction of the state court. The matter was recessed until the following morning at 9 a.m. for the taking of evidence and Mr. Brown was advised that if plaintiffs made no appearance, the hearing would be held in their absence.

VII

On Tuesday, November 27, 1973, in open court, testimony was heard from witnesses, including an expert witness, and the court viewed the film. Based on the evidence the court ruled that the film "Deep Throat" was obscene beyond reasonable doubt and issued an Order of Seizure After Adversary Hearing, directing officers to seize any copies of "Deep Throat" currently at the Buena Park Pussycat Theater or which were to be found there in the future, and to bring same before the court. (Certified copies of the transcript of the hearing and of the court's order are attached and labeled Attachments K and L.)

This order was served upon the theater that very day, though no seizure was made as no copies of the film were present.

VIII

On November 29, 1973 Plaintiffs, instead of pursuing the appellate remedies available to them in the state courts, sought a temporary restraining order from the United States District Court, Central District of California. The case was assigned to the Honorable Lawrence T. Lydick who denied the request for temporary restraining order but determined that the defendants' claim concerning issuance of the superior court were not "wholly insubstantial" and duly sought the convening of a three-judge court.

IX

Personal service of summons, complaint and accompanying points and authorities and affidavits was made on defendant District Attorney Cecil Hicks on January 14, 1974 and on defendant Deputy District Attorney Oretta D. Sears on January 11, 1974.

X

As shown by the declarations of the Honorable John H. Smith Jr., (Attachment A), Detective Arthur Fontecchio (Attachment B), Detective Thomas R. Hafdahl (Attachment C), Detective Daniel Harrison (Attachment D), Deputy District Attorney John F. Anderson (Attachment E), District Attorney Cecil Hicks (Attachment M) and Deputy District Attorney Oretta D. Sears (Attachment N): (1) the four copies of the films were seized on the orders of a duly elected state judge; (2) four copies were ordered seized because they all differed one from another; (3) four copies would not have been ordered seized by the state judge and a search warrant for their seizure would not have even been sought prior to a final judicial determination on the issue of obscenity, had they not been different; (4) a duly filed criminal complaint alleging violation of a California Penal Code Section 311.2 has been filed in respect to each of the films involved in the seizures, and said complaint is presently pending in the Municipal Court, North Orange County Judicial District; (5) Defendants Cecil Hicks and Oretta D. Sears have at all times acted within the scope of their duties prescribed by law, have conscientiously and sincerely performed their duties, and have never misused or abused the powers of their office.

* * *

Excerpts From State Court Orders, Pleadings and Proceedings (Federal Court Attachments and Exhibits).

(a) State Order to Show Cause.

Filed January 29, 1974 [R. pp. 17-18]

In the Superior Court of the State of California, in and for the County of Orange.

The People of the State of California, Plaintiff, vs. Vincent Miranda, dba Pussycat Theater, Walnut Properties, Inc., Edward Lee Bailey, James Samuel Lytell, and Sandy Kay Thompson, and Jesse Lee Crabtree, Defendants. M-2248.

ORDER TO SHOW CAUSE, TEMPORARY RESTRAINING ORDER AND ORDER SHORTENING TIME.

[Filed November 27, 1973 in
Orange County Superior Court]

On the application of the People of the State of California and on the accompanying affidavit in support of search warrant, sworn and subscribed before me by Art Fontecchio and having personally viewed the 35 mm film entitled "Deep Throat" and having found from the above document and sworn testimony before me by Art Fontecchio and from my own observation that there is probable cause to believe: (a) that the premises located at 6177 Beach Boulevard, Buena Park, contain a copy of the said film entitled "Deep Throat" which is obscene under Penal Code Section 311.2 and 311.5; (b) that said copy of film is being held with the intent of displaying same and is being displayed.

IT IS HEREBY ORDERED that Walnut Properties, Inc., Edward Lee Bailey, James Samuel Lytell and

Sandy Kay Thompson appear before the Orange County Superior Court, 700 Civic Center Drive West, Santa Ana, California, Department 21 of said Court, at 2:30 p.m. on Friday, November 30, 1973, there and then to show cause why all copies of the above-said film should not be ordered seized as contraband.

IT IS FURTHER ORDERED that the above-named persons, their agents, associates, counsel representatives or the persons or corporations in control of the premises refrain from showing, exhibiting, displaying or advertising the movie "DEEP THROAT": and further refrain from removing the said film from 6177 Beach Boulevard, Buena Park or in any way disposing of said copies of said film until after the conclusion of this Order to Show Cause hearing. Walnut Properties, Inc., Edward Lee Bailey, James Samuel Lytell and Sandy Kay Thompson, their agents, associates, employers, counsel and representatives are hereby ordered to hold the above-described copies of film in the above-described premises at the disposal of the Court until the Order to show Cause hearing has been concluded.

The Plaintiff's motion for an order shortening time is hereby granted and Plaintiff is ordered to make service on the above-named corporation and persons on or before November 27, 1973, at 4:00 p.m.

It is further ordered that should it be deemed necessary by counsel for defendants or any of them, the hearing in re the Order to Show Cause may be set at any time prior to Friday, November 30, 1973, upon request of said counsel, provided (C.T. p. 272) counsel for the People receive one hour notice and subject to the schedule of this court.

Dated this 26th day of November, 1973.

BYRON K. McMILLAN
JUDGE OF THE SUPERIOR COURT

(b) Application for Order to Show Cause in State Court [R. pp. 24-25].

In the Superior Court of the State of California, in and for the County of Orange.

The People of the State of California, Plaintiff, vs. Vincent Miranda, dba Pussycat Theater, Walnut Properties, Inc., Edward Lee Bailey, James Samuel Lytell, and Sandy Kay Thompson, and Jesse Lee Crabtree, Defendants. M-2248.

APPLICATION FOR ORDER TO SHOW CAUSE AND FOR A TEMPORARY RESTRAINING ORDER

[Filed November 26, 1973
in Orange County Superior Court]

COMES NOW THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs in the above-entitled action, who by their attorney, Cecil Hicks, and upon the subscribed and sworn affidavit in support of search warrant for the premises located at 6177 Beach Boulevard, Buena Park, of Art Fontecchio, which affidavit is attached hereto and incorporated by reference as though fully set forth herein, prays this Honorable Court to issue its order requesting Walnut Properties, Inc., Edward Lee Bailey, James Samuel Lytell, and Sandy Kay Thompson to appear before this Honorable Court and show cause why all copies of the 35 MM film entitled "DEEP THROAT" should not be declared obscene by this Honorable Court and why they should not be forever enjoined from further exhibition, showing, displaying, advertising, selling, or publishing said copies or any part thereof.

Plaintiff, People of the State of California, upon that same affidavit and for the reasons herein stated,

ask that this Honorable Court issue a temporary restraining order prohibiting the above-named defendants from showing, exhibiting, displaying, or advertising the movie "DEEP THROAT" and further prohibiting the above-named persons from removing the above-described copies of the said film out of 6177 Beach Boulevard, Buena Park, and from disposing of same in any manner, and further ordering said defendants to hold said copies of film at the court's disposal and to produce same at the court's request.

A complaint has been filed against the above-named defendants and others alleging violations of Penal Code Sections 311.2 and 311.5.

Plaintiff, because of the United States Supreme Court requirements, respectfully urges this Honorable Court to order the matter to be heard on Friday, November 30, 1973, or earlier and to shorten time to allow hearing to be had on that date.

(c) Excerpts From Reporter's Transcript of State Court Proceedings Held November 27-28, 1973 [R. pp. 283-319].

The Superior Court of the State of California, for the County of Orange.

Department No. 21.

Hon. Byron K. McMillan, Judge.

The People of the State of California, Plaintiff, vs. Vincent Miranda, et al., Defendants. No. M-2248.

REPORTER'S TRANSCRIPT PURSUANT TO SECTIONS 1539 and 1540 OF THE PENAL CODE
REPORTER'S TRANSCIPT

November 27, 28, 1973.

* * *

SANTA ANA, CALIFORNIA—TUESDAY, NOVEMBER 27, 1973

THE COURT: People versus Miranda.

* * *

MR. BROWN: Your Honor, my name is David M. Brown, a member of the Fleishman, McDaniel, Brown & Weston and we are here representing Vincent Miranda, Walnut Properties, Incorporated, and Edward Lee Bailey, James Samuel Lytell; at this time I am not authorized to enter an appearance on behalf of Sandy Kay Thompson or Jesse Lee Crabtree.

I am appearing here, Your Honor, for one purpose and one purpose only, and that is to contest the jurisdiction of this Court over the subject matter contained in the Order to Show Cause and temporary restraining order.

I am not here to argue or otherwise present evidence or do anything else with respect to the obscenity or nonobscenity of the film Deep Throat, because it is our considered position that the Court has no jurisdiction and no authority in law to deal in any way with that question or to order the temporary restraining order which has been issued or the Order to Show Cause. (T. p. 3 ll. 1-18.)

* * *

The People have filed a criminal prosecution; that is their remedy under the laws of the State of California, there is no corresponding civil remedy to enjoin the exhibition of the film to seize all copies of the film or to declare it obscene. (T. p. 4 ll. 13-17.)

* * *

Now, all I have before me is an Order to Show Cause without a proceeding; there is not even a complaint, not even a complaint to file in the Superior Court.

Now, where does the Superior Court have jurisdiction to enter a temporary restraining order where there is not even a case pending before the Superior Court?

I have never heard of such a thing and if there is jurisdiction to do it, it seems to me the burden is upon the plaintiff to show where the jurisdiction is and they plainly have not done so.

There is no authority whatsoever in the papers that the plaintiff has filed, not a single citation of authority to show where the legal authority is for the extraordinary relief which the Court has issued. (T. pp. 6-7.)

* * *

Now, I think, I find myself in an unfortunate posture because I am trying to argue against something which is formless, shapeless, has no name, and I think perhaps it would be appropriate before any further argument to get on the record from the plaintiff a statement of what authority the plaintiff is proceeding under in this matter.

If I am to argue against it, I think I am entitled to know what it is.

So, with the indulgence of the Court, I would ask Mrs. Sears to put that on the record.

MRS. SEARS: Yes, I would be delighted to do so.

If the Court pleases, I think counsel has made several statements, to wit, concerning Red Light Abatement actions but what we are really dealing with is not a Red Light Abatement yet.

We have not yet asked for the closure of the theater as part of our relief, which is, of course, the primary purpose of the Red Light Abatement Act and we may or may not, I do not know. (T. pp. 8-9.)

* * *

I should point to the Court an Order to Show Cause issued in conjunction with a search warrant and this is what we must remember that whatever you wish to call this proceeding, when he states it as a complaint, equity, et cetera, et cetera, I went that route once and I was told, "It ain't in equity, ma'am," in just those words in the Lear Case.

What we are dealing with is an order by the Court requesting that a certain seizure be made and that a hearing be had forthwith before anything else goes on.

In other words, an order by the Court to keep the status quo rather than to seize, make a mass seizure, because that is what it amounts to, the request of the People is that all copies be seized. (T. p. 9.)

* * *

Now, the authority for seizing items that are there as contraband, I think is within the purview of 1538.5 and 1540 and 1536; any contraband, any time the Court has reason to believe that contraband exists, the Court has a right to seize it.

The authority to proceed with an adversary hearing is found in the fact that the Supreme Court of the United States considers this to be a proper way to do it; it is also found in the 1538.5 which specifies that the statute is not intended to interfere with hearings required under the First Amendment and obviously it

seems to me, then, that the Court's power under the California Constitution which gives the Court power to do all that which is necessary to guarantee the rights of the defendant under the First Amendment. (T. pp. 13-14.)

* * *

MR. BROWN. I now understand that the Court has not issued any search warrant, per se; it has issued a temporary restraining order.

Now, the curious thing is that the Court has already made a mass seizure of the film Deep Throat before any hearing, adversary or otherwise, on the issue of obscenity.

There has already been a mass seizure, because my client has been ordered not to exhibit the film Deep Throat to anyone pending hearing on an Order to Show Cause.

Now, call it mass seizure, call it a total prior restraint on the freedom of expression and it is both of those things, but they have preceded the hearing and not followed the hearing.

I would like to point out to the Court also if the Court alleged jurisdiction lies in its authority to issue search warrants, then, how can it have any authority to declare the film Deep Throat to be obscene?

This is not an action for declaratory relief, apparently, it is solely an application for a search warrant.

Now, if that is true, the only issue before the Court is probable cause; is there or is there not probable cause to believe Deep Throat obscene?

If there is probable cause, a search warrant can issue.

Although I would state that the Federal Constitution prohibits another search warrant from issuing after four identical copies of the film and they are identical, have already been seized, but in any event the obscenity or nonobscenity of the film is not even in issue before the Court.

The Court can't render a decision that Deep Throat is obscene if this is only an application for search warrant; that is what the Penal Code Sections provide. (T. p. 20.)

* * *

MR. BROWN: It is our position that the Court has no jurisdiction in this proceeding to determine obscenity or nonobscenity. . . . we are of the firm opinion that there is no jurisdiction for the proceeding, that this entire proceeding violates the First, Fourth, and Fourteenth Amendment of the U.S. Constitution, and that accordingly we do not feel that we can litigate the issue of obscenity on the merits and we decline counsel's invitation to do so. (T. p. 29.)

* * *

THE COURT: Well, I do think that the Court is with jurisdiction to make a determination as to what is or isn't obscene.

MR. BROWN: With respect to that, Your Honor, it is our position that the Court has no jurisdiction in this proceeding to determine obscenity or nonobscenity.

There is no jurisdiction for this proceeding at all to determine anything.

If it is just an application for search warrant, then, it is just a question of probable cause.

In any event, we are of the firm opinion that there is no jurisdiction for the proceeding, that this entire

proceeding violates the First, Fourth, and Fourteenth Amendment of the U.S. Constitution, and that accordingly we do not feel that we can litigate the issue of obscenity on the merits and we decline counsel's invitation to do so.

MR. BROWN: Do I understand the Court has not seen the film?

THE COURT: I have not.

MR. BROWN: I only ask the question because the Order to Show Cause recites that the Court has seen.

THE COURT: Just says from observations. (T. p. 32.)

* * *

THE COURT: We will just continue the hearing over to nine o'clock tomorrow.

MR. BROWN: Well, Your Honor, I will object to any continuance. The Order to Show Cause recites—

THE COURT: That is just the next business day; it is now ten to four and I have a jury out and I have some things I have to do. We will go on from now until nine o'clock tomorrow. (T. pp. 34-35.)

* * *

MR. BROWN: I will indicate my appearance was solely for the purpose of contesting jurisdiction.

THE COURT: You don't have to come back tomorrow, if you are not here I will understand.

MR. BROWN: Without insulting the Court.

THE COURT: Yes. (T. p. 35.)

* * *

MRS. SEARS: I would like, since Dr. Sears is my husband and also the expert for the County in these cases, to ask Mr. Anderson to take over the questioning.

MR. ANDERSON: We would call Dr. Sears, Your Honor. (T. p. 38.)

* * *

THE COURT: Well, probably the most crucial point in the order and our determination is the finding of obscene beyond any reasonable doubt, and I don't know, I may not be an expert, I have seen a lot of stag films and I think that Deep Throat is no better and probably worse than a lot of the stag films that I have viewed. The closeup of anal sex, of penis ejaculated into the mouth of a woman, of group sex, and a lack of any kind of a plot, there is a stab of humor that is so base and so, just without real humor, that I really can't find any justification other than exploitation of sex and I think that the, the whole sake of the flick is its prurient appeal without anything else, and based upon what I saw, what I have heard, expert and otherwise, the Court does find that it is obscene beyond any reasonable doubt, that the reels are held at the Beach Boulevard address for the purpose of exhibition and the material should be seized and will so order it.

There is a question as to whether or not every time they come out with a new reel of this production we are going to have to make a subsequent order on it, and I think that is just a useless, expensive act. I would feel safe in saying any reel of Deep Throat, I don't see how they could make one good, that any reel ought to be snapped up. (T. pp. 43-44.)

* * *

(d) Appendix B to Affidavit of David Brown [R. p. 26].

Superior Court of the State of California, for the County of Orange.

People of the State of California, Plaintiff, vs. Vincent Miranda, etc., et al., Defendants. No. .....

RESERVATION OF FEDERAL CONSTITUTIONAL QUESTIONS

By appearing in the above-entitled action, Defendants do not waive but, on the contrary, specifically reserve all federal constitutional claims for purposes of federal jurisdiction.

DATED: November 27, 1973.

FLEISHMAN, McDANIEL, BROWN & WESTON

(e) Excerpts From Transcript of State Municipal Court Proceedings [R.T. pp. 369-399] Filed as Attachment to Affidavit of David Brown on February 2, 1974.

In the Municipal Court of the North Orange County Judicial District, State of California.

The People of the State of California, Plaintiff, vs. Edward Lee Bailey, James Samuel Lytell, Walnut Properties, Inc., Vincent Miranda, John Doe I, John Doe II, Defendants. Case No. NM73 06675.

TRANSCRIPT OF COURT PROCEEDINGS
HONORABLE MAX V. ELIASON,
JUDGE

JANUARY 29, 1974

MR. BRENT SWANSON, Deputy District Attorney, appeared as counsel for the People.

MR. DAVID M. BROWN, Attorney at Law, appeared as counsel for the Defendants.

DELIEZE CONNELL, Court Reporter. (T. p. 2.)

* * *

THE COURT: People versus Edward Lee Bailey, James Lytell, and I think there have been others added to the amended Complaint. Walnut Properties, Incorporated and Vincent Miranda. (T. p. 3.)

MR. BROWN: Yes, your Honor. David M. Brown appearing for the defendants.

MR. SWANSON: Brent Swanson appearing for the People, your Honor.

* * *

Now, finally, your Honor, you'll notice in reading the papers here that quantities of cash were seized from the theater on each occasion, in all about five thousand dollars. In this regard counsel and I will enter into a stipulation that the cash will be returned to the moving parties upon their written agreement that the police may make copies of the bills and cash which were seized and the copies may be admitted at the trial in lieu of the original money preserving any other objections to the legality of the seizure that we might have.

Is that the correct stipulation?

MR. SWANSON: That's the correct stipulation with the exception that I would think that if counsel intends to raise in some way some impropriety in seizure of that money that now is the time to do it. I mean, we're at a 1538.5 and as counsel noticed a Section 1539 and 1540 hearing, so if there is some

illegality that counsel intends to raise on that seizure, I think now is the time to do it not at trial.

MR. BROWN: The stipulation is only stating that we do not reserve any legal arguments which we have on this motion, but we do waive any best evidence objection to be received in evidence of the copies in lieu of the originals. (T. pp. 15-16.)

* * *

MR. SWANSON: With respect to Roman numeral V, the contention there basically is that the material itself is not obscene and therefore protected. As I mentioned a few moments ago, the defendant did bring this motion not only under 1538.5 but also 1539 and 1540 of the Penal Code and apparently that's the one area which counsel—this Roman number V would appear to be appropriate in a 1539-40 type of issue.

With respect to that particular Roman numeral V, the People would merely point out to the Court that absent a showing of films themselves, the Court simply would be unable to make that type of determination in this instance and since that has not been done, I would submit that the Court would have—would be unable to proceed with respect to that Roman numeral V.

MR. BROWN: Your Honor, to help out on that, we're not urging at this hearing the non obscenity of the film on the merits. That issue will be reserved for the trial, so I don't think the Court need worry about that. (T. p. 18.)

* * *

MR. SWANSON: Your Honor, might I inquire of counsel then because I think the People for purposes of sustaining two of the four basic counts and in the

first part of the Complaint are faced with a situation of either having the officers review each of those four films and then familiarize themselves with the differences between the two that your Honor is indicating that you'll be suppressing or perhaps counsel would stipulated that for purposes of trial that only the first film which was seized would need to be shown or otherwise described to the jury and that film could be stipulated then as being for all intents and purposes of the same one with the exception of very minor differences which would not affect the instant of obscenity. It was shown on each of the four alleged occasions.

MR. BROWN: Your Honor, I think for present purposes the Court has ruled the seizure of the last two prints was unlawful and they should be suppressed. I don't think we need get into now the question of whether the officers will be permitted to testify at the trial as to the contents of the last two films. They are in the officers' possession and I'm certain they have viewed them prior to Notice. They have made their observations whether they're admissible or not. Frankly, I doubt whether they'd be admissible because the seizures were unlawful, but I don't think the Court need reach that now. I think that's an issue to be decided at trial in the event that such testimony is offered. (T. p. 30.)

* * *

MR. SWANSON: Your Honor, I think counsel and I can resolve the problem by stipulating at this time, and this would be a stipulation which I think we're agreeing would be offered at the time of trial and would be binding upon both of us at that time, that each of the four copies are identical. I think perhaps that would solve our problem.

MR. BROWN: I would so stipulate, your Honor.

THE COURT: The stipulation will be received. All the argument here has been that the last three are the same.

MR. SWANSON: Well, I think we're trying to resolve the problem in a practical fashion, your Honor. It's not our desire to have to show more than one of those films at the time of trial if we can avoid it. The repetitiveness I think would have—

THE COURT: To make sure we understand the stipulation then, would you state it again.

MR. SWANSON: We're stipulating then, your Honor, that the three copies which were subsequently seized—In other words copies two, three, and four would be identical in every respect to the first film that was seized.

THE COURT: For purposes of trial?

MR. SWANSON: For purposes of trial, yes.

THE COURT: Do you so stipulate, Mr. Brown?

MR. BROWN: That's agreeable.

THE COURT: The stipulation will be received. (T. pp. 33-34.)

* * *

Affidavit of David Brown in Support of Preliminary Injunction Filed February 25, 1974 [R.T. pp. 365-367].

DAVID M. BROWN, being first duly sworn, deposes and says:

1. I am an attorney duly admitted to the practice of law in the State of California and am a member of FLEISHMAN, McDANIEL, BROWN & WESTON, a Professional Corporation, counsel of record for Plaintiffs herein.

2. All of the Defendants herein have moved to dismiss and for summary judgment claiming, *inter alia*, that the seizures of four prints of the film "Deep Throat" prior to any adversary hearing on the issue of obscenity, did not constitute harassment and bad faith law enforcement since the four copies were not identical. Defendants appear to concede that multiple seizures of identical prints of the same film, prior to an adversary hearing on the issue of obscenity, would constitute bad faith law enforcement and harassment, a concession compelled by the Supreme Court's recent decision in *Heller v. New York*, 413 U.S. 483, 93 S.Ct. 2789.

3. On January 29, 1974, proceedings were brought in the Municipal Court of the North Orange County Judicial District to suppress evidence and restore seized property in the case of *People of the State of California v. Edward Lee Bailey, et al.*, No. NM-7306675, the misdemeanor obscenity prosecution arising out of the seizures of the film "Deep Throat" at Plaintiffs' theatre. At the conclusion of the hearing, the Honorable MAX V. ELIASON, Judge of the said Municipal Court, granted the Motion to Suppress and Restore with respect to

the third and fourth copies of the film seized by Defendants.

The basis for the Court's ruling was that an examination of the Affidavits in support of the Search Warrants for the seizure of the second, third and fourth copies of the film revealed, on their face, that the second, third and fourth prints all were identical. The Court stated:

> "As to the affidavits being the same, being the same seizure, it appears that the last three are the same according to the affidavit. In view of Heller. . . . It appears that the last two seizures are not permitted because their being duplication. Therefore the §1538 to the last two seizures would be granted." [Reporter's Transcript, January 29, 1974, p. 29, lns. 15-22] [A copy of the said Reporter's Transcript is attached hereto as Appendix "A"].

4. In view of Judge Eliason's ruling that the Affidavits in support of the Search Warrants herein *do not even claim* that there are any differences between the second, third and fourth prints of the film "Deep Throat" seized by Defendants, the Defendants' present condition that the multiple seizures were made in good faith based upon claimed differences among the several prints is patently untenable.

* * *

Minute Order Retransferring Case [R. p. 340].

CIVIL MINUTES—GENERAL

Case No. 73-2775-LTL.

Date: 2/4/74.

Title: Vincent Miranda, etc. et al. v. Cecil Hicks, et al.

DOCKET ENTRY

On the Crt's own motn, IT IS ORD that deft's motn to dismiss complt, prev noted for hrg bef Judge Lydick on 3/4/74, 10 am, is transferred to the Calendar of Judge Ferguson, Crtroom #15 on the same date & at the same time. (F)

Present: Hon. Warren J. Ferguson, Judge; Beverly Corcoran, Deputy Clerk; Not Present, Court Reporter.

Attorneys Present for Plaintiffs: Not Present.

Attorneys Present for Defendants: Not Present.

PROCEEDINGS.

On the Court's own motion, IT IS ORDERED that defendant's motion to dismiss the complaint, previously noted for hearing before the Honorable Lawrence T. Lydick on March 4, 1974 at 10:00 A.M. is hereby transferred to the Calendar of the Honorable Warren J. Ferguson, Courtroon No 15 on the same day and at the same time.

Clerk's Letter [R. pp. 341-342].

United States District Court, Central District of California, Office of the Clerk, U.S. Courthouse, RM G-8, Los Angeles, California 90012.

Edward M. Kritzman, Clerk.
Edward F. Drew, Chief Deputy.

February 8, 1974

Fleishman, McDaniel, Brown & Weston
David M. Brown, Esq.
Suite 718 Max Factor Building
6922 Hollywood Boulevard
Hollywood, California 90028

Cecil Hicks, District Attorney
County of Orange, State of California
Michael R. Capizzi, Assistant District Attorney
Oretta D. Sears, Deputy District Attorney
By: John D. Conley, Deputy District Attorney
P. O. Box 808
Santa Ana, California 92702

Kinkle, Rodiger, Graf, Dewberry & Spriggs
Mario A. Iorillo, Esq.
621 Sunset Boulevard
Los Angeles, California 90012

Re: Vincent Miranda etc. vs. Cecil Hicks, et al.
Case No. 73-2775-LTL

Gentlemen:

Enclosed for your information is a copy of an Order of the Chief Judge of the Court of Appeals for the Ninth Circuit designating a three-judge court to hear and determine the above cause and all motions and proceedings therein.

Filings therein in the future should be directed to the Honorable Warren J. Ferguson, U.S. District Judge for the Central District of California. Copies of all filings should be mailed to the Honorable Walter Ely, U.S. Circuit Judge for the Ninth Circuit and the Honorable William G. East, Senior U.S. District Judge for the District of Oregon.

Very truly yours,
Kim Schmidgall
Deputy Court Clerk to
Judge Lydick

Order Designating United States Circuit Judge and United States District Judges Pursuant to §2284, Title 28, United States Code [R. p. 342].

Whereas in my judgment the public interest so requires, I, pursuant to the provisions of §2284, Title 28, United States Code, do hereby designate and appoint the

HONORABLE WALTER ELY

United States Circuit Judge for the Ninth Circuit, and the

HONORABLE WARREN J. FERGUSON

United States District Judge for the Central District of California, and the

HONORABLE WILLIAM G. EAST

Senior United States District Judge for the District of Oregon, to hold district court for the Central District of California at a time and place to be agreed upon by said judges, and to hear and determine the following cause:

Vincent Miranda, dba Walnut Properties, and Pussycat Theatre Hollywood, a California corporation, plaintiffs, vs. Cecil Hicks, District Attorney of the County of Orange, and Dudley D. Gourley, Chief of Police of the City of Buena Park, et al., Defendants, #73-2775-LTL, and all motions and proceedings therein.

If there be any objection to the membership of the court as constituted, a party shall file the objection within 14 days after the date of the filing of this order.

DATED: January 8, 1974.

Chief Judge, Ninth Circuit

IM

cc: Judge Ely
cc: Judge Ferguson
cc: Judge East
cc: Clerk, C.Cal.
cc: Clerk, 9 CA
cc: Clerk, Ore.

Affidavit in Support of Defendant's Motion to Dismiss [R. pp. 404-405].

[Caption Omitted in Printing]

AFFIDAVIT OF C. BRENT SWANSON IN SUPPORT OF DEFENDANT'S MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT

Filed February 28, 1974

C. BRENT SWANSON, being first duly sworn, deposes and says:

1. I am an attorney duly admitted to the practice of law in the State of California and am a member of the Orange County District Attorney's Office.

2. On January 29, 1974, proceedings were brought in the Municipal Court of the North Orange County Judicial District to suppress evidence and restore seized property in the case of *People of the State of California v. Edward Lee Bailey, et. al.*, No. NM 73-06675, the misdemeanor obscenity prosecution arising out of the seizures of the film "Deep Throat" at Plaintiff's theatre. In those proceedings the only evidence that was offered by either the People or the Defendants was a certified copy of each of the four search warrants, including the "Affidavit in Support of Search Warrant" and the "Return to Search Warrant". The essence of the Defendants' argument was that as the affidavits of the last three search warrants were identical, the seizures under these three warrants violated the procedural requirements set forth by the United States Supreme Court in *Heller v. New York,* 93 S.Ct. 2789. The

People replied in effect that this was not in fact the holding of *Heller,* and that under the facts before the Court the Defendants would have to present evidence in contravention of the affidavits before the presumption of validity which is accorded search warrants could be overcome. The Court, however, adopted the Defendants' position, and ordered the third and fourth copies of the film suppressed and returned to the Defendants.

3. On February 15, 1974, the People filed in the Municipal Court of the North Orange County Judicial District a "Notice of Appeal" and "Appellant's Proposed Statement of Facts" appealing from the Court's decision of January 29, 1974, ordering evidence suppressed and returned. The People also filed in that same Court on that date a "Notice of Motion and Motion to Reopen the Prior Ruling of the Court". The Court was requested by this motion to reopen the proceedings to suppress evidence and restore property for the purpose of making a determination of the obscene nature of the two copies of the film the Court had ordered returned to the Defendants. A certified copy of each of the above specified documents, as well as two pages of the Court's docket covering the applicable proceedings, is attached hereto and incorporated herein by this reference.

4. On February 26, 1974, the above People's "Motion to Reopen the Prior Ruling of the Court" was heard in the Municipal Court of the North Orange County Judicial District. The People argued that as the Court had not on January 29, 1974, made any de-

termination respecting the issue of obscenity it was not only appropriate but in fact required by a decision of the California Supreme Court to reopen the proceedings for that purpose. The Defendants took the position that the filing of the "Notice of Appeal" removed the Municipal Court's jurisdiction to grant the motion. The Court denied the People's motion, adopting the same position as the one taken by the Defendants, but conceded that the Superior Court would probably remand the case for a determination of the issue of obscenity at the time the People's appeal was heard.

Order Regarding Submission of the Merits of the Action [R. pp. 427-428].

Filed March 20, 1974

[Caption Omitted in Printing]

Before: Honorable Walter Ely, Circuit Judge, Honorable Warren J. Ferguson, District Judge.

PER CURIAM.

NOTICE IS GIVEN TO THE PARTIES HEREIN as follows:

1. The *Younger v. Harris* issue of bad faith harassment will be submitted to the three-judge court upon affidavits to be submitted by the parties hereto. (C.T. p. 426)

2. The *Miller v. California* issue will be submitted to the court without oral argument and upon brief and written statements in support and opposition.

3. All affidavits and briefs to be submitted by the plaintiffs shall be filed no later than April 3, 1974.

4. All affidavits and briefs of the defendants shall be filed no later than April 17, 1974.

5. Any reply briefs or affidavits of the plaintiffs shall be submitted no later than April 24, 1974.

6. On April 24, 1974 at 10:00 a.m. the cause will be submitted to the three-judge court without further argument or further proceedings. The court will not convene in person and counsel and parties need not appear.

IT IS FURTHER ORDERED that the clerk shall serve copies of this order by United States mail upon counsel for the parties appearing in this action.

Notice of Motion for Rehearing and for Relief From Judgment and to Amend and Alter Judgment and to Correct Errors in the Judgment and Record and to Stay Judgment Pending Determination of That Motion (F.R.C.P. 59 (a), 59 (e), 60 (a), 60 (b), and (62) [R. p. 531].

Filed June 14, 1974

[Caption Omitted in Printing]

TO: PLAINTIFF AND ITS COUNSEL, DAVID M. BROWN OF FLEISHMAN, McDANIEL, BROWN & WESTON

PLEASE TAKE NOTICE that on July 1, 1974, at 10:00 A.M. or as soon thereafter as counsel may be heard in the courtroom of the Honorable Warren J. Ferguson, United States District Judge, Courtroom No. 15, located at 312 North Spring Street, Los Angeles, California, Defendants GOURLEY, FONTECCHIO, HAFDAHL and HARRISON will move the Court for rehearing and for relief from Judgment and to amend and alter Judgment and to correct errors in the Judgment and record and to stay Judgment pending determination of this Motion, pursuant to Rules 59 (a), 59 (e); 60 (a), 60 (b), and 62 of the Federal Rules of Civil Procedure. The Court will be asked to set aside the Findings of Fact and Conclusions of Law and Judgment heretofore entered in that the Court erred in its ruling, the Judgment is contrary to law, and the Court made errors of fact and its Findings which should be corrected.

Notice of Motion for Relief From Judgment, for Rehearing, and for Stay of Judgment Pending Determination of That Motion [R. p. 533A].

Filed June 14, 1974

[Caption Omitted in Printing]

TO: PLAINTIFF AND ITS COUNSEL, DAVID M. BROWN OF FLEISHMAN, McDANIEL, BROWN & WESTON

PLEASE TAKE NOTICE that on July 1, 1974, at 10 a.m. or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Warren J. Ferguson, United States District Judge, Courtroom No. 15, located at 312 North Spring Street, Los Angeles, California, Defendants CECIL HICKS and ORETTA SEARS will move the court for relief for judgment, for rehearing and for a stay of judgment pending determination of this motion, pursuant to Rules 60b and 62 of the Federal Rules of Civil Procedure. Said motion will be made on the Points and Authorities attached hereto and on all points and authorities, pleadings and exhibits heretofore filed in this matter.

(a) Municipal Court Complaint (Attachment (A) to Motion for Relief From Judgment) [R. p. 574].

In the Municipal Court of North Orange County Judicial District, County of Orange, State of California.

The People of the State of California, Plaintiff, vs. Edward Lee Bailey 12/22/46, James Samuel Lytell 1/26/43, Walnut Properties, Inc/Vincent Miranda, John Doe I, John Doe II, Defendant(s) No. NM73-6675 amended.

* * *

COMPLAINT—CRIMINAL
MISDEMEANOR

The undersigned hereby certifies, upon information and belief: COUNT V: That on or about the 23rd day of November, 1973, at and within North Orange County Judicial District, Orange County, California, the crime of Misdemeanor, to-wit: Violation of Section 311.2 of the Penal Code was committed by EDWARD LEE BAILEY, JAMES SAMUEL LYTELL, WALNUT PROPERTIES, INC/VINCENT MIRANDA, JOHN DOE I and JOHN DOE II who at the time and place last aforesaid, did then and there willfully and unlawfully and knowingly exhibit, distribute or offer to distribute or have in their possession with intent to distribute or to exhibit or offer to distribute, obscene matter, to-wit: a 35 mm film entitled "Deep Throat."

* * *

Wherefore, and based upon the declaration attached, said complainant prays that a warrant may be issued for the arrest of EDWARD LEE BAILEY, JAMES SAMUEL LYTELL, WALNUT PROPERTIES, INC/ VINCENT MIRANDA, JOHN DOE I, and JOHN DOE II and that they be dealt with according to law. I declare under penalty of perjury that the foregoing is true and correct.

Dated: January 9, 1974

.....

Complainant

Place of Execution:
Orange County, California

* * *

Order Re Hearing on Motions
Filed June 24, 1974 [R. pp. 597-8].

[Caption Omitted in Printing]

Before: Honorable Walter Ely, Circuit Judge, Honorable William G. East, and Honorable Warren J. Ferguson, District Judges.

The motions of the defendants filed June 14, 1974 and scheduled for hearing on July 1, 1974 will be submitted and determined without oral hearing upon brief written statements of reasons in support and opposition pursuant to Rule 78 of the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED that the Clerk serve copies of this order by United States mail upon the attorneys for the parties appearing in this action.

Dated this 24th day of June, 1974.

Warren J. Ferguson
WARREN J. FERGUSON
United States District Judge

Affidavit of David Brown in Partial Opposition to Stay.

Filed June 17, 1974 [R. pp. 594-595]

DAVID M. BROWN, being first duly sworn, deposes and says:

1. I am a member of FLEISHMAN, McDANIEL, BROWN & WESTON, a Professional Corporation, attorney of record for Plaintiffs herein.

2. Defendants have moved for relief from judgment and for rehearing, and have noticed their motions for July 1, 1974. In connection with these post-trial motions, Defendants also have applied for a temporary stay of the judgment pending determination of the motions.

3. The judgment entered by this Court on June 4, 1974, included an order that Defendants return to Plaintiffs certain property seized from Plaintiffs' theater. Among the property seized was four complete prints of the film "Deep Throat."

4. Defendants contend that return of all four copies of the film would "effectively terminate" a pending state court criminal prosecution alleging violation of the California obscenity statute by exhibition of the said film at Plaintiffs' theater.

5. In connection with pretrial motions made in the Orange County misdemeanor prosecution, I, acting as counsel for the defendants in that case, stipulated with the prosecution that for purposes of trial, all four prints

of the film would be deemed identical. Accordingly, the prosecution requires but one copy of the film for the possible future trial of the criminal case.

6. Plaintiffs herein do not oppose the granting of a stay of judgment which would permit Defendants to retain one copy of the film pending a determination of Defendants' post-trial motions, and pending appeal, should an appeal be taken. Plaintiffs do oppose Defendants' application for a stay of judgment in all other respects.

* * *

Application for Order to Show Cause in Re Contempt.

Filed August 3, 1974

(Caption omitted in printing)

COME NOW, VINCENT MIRANDA doing business as WALNUT PROPERTIES, and PUSSYCAT THEATRE-HOLLYWOOD, a California corporation, Plaintiffs in the above-entitled action, and respectfully apply for the following:

1. For a Temporary Restraining Order, a Preliminary Injunction, and a Final Injunction, requiring the Defendants to deliver forthwith to Plaintiffs all prints of the motion picture film "Deep Throat," and all prints of the motion picture film "Devil In Miss Jones," which have been seized by said Defendants from Plaintiffs' motion picture theatre in the City of Buena Park, California, which seizures occurred subsequent to July 29, 1974, and restraining Defendants from any further seizures of copies of the said films from Plaintiffs' theatre.

2. For a Temporary Restraining Order, a Preliminary Injunction, and a Permanent Injunction, restraining Defendants from commencing or carrying on any criminal prosecutions against Plaintiffs or their employees pursuant to California Penal Code §311, et seq.

3. For an Order to Show Cause why the Defendants, and each of them, should not be found in contempt of this Court for failing and refusing to return to Plaintiffs four previously seized copies of the said motion picture film "Deep Throat," which this Court previously ordered said Defendants to return to Plaintiffs by judgment entered on June 4, 1974, which judgment was served on Defendants, and each of them, and of which judgment Defendants, and each of them, had actual notice.

4. For an Order to Show Cause why Defendants should not be required to pay damages to Plaintiffs for such contempt; and

5. For such other and further relief, including assessment of attorneys' fees and expenses, as the Court deems just, on the ground that Defendants, their agents and employees, and other persons in active concert and participation with said Defendants, wilfully, knowingly and intentionally disregarded and violated the order and judgment issued by this Court on June 4, 1974.

The grounds for this Application are set forth in the accompanying Affidavit of DAVID M. BROWN in support of this Application.

(a) Affidavit of David M. Brown in Support of Application in Re Contempt.

Filed August 3, 1974

State of California, County of Los Angeles—ss.

DAVID M. BROWN, being first duly sworn, deposes and says:

1. I am an attorney duly admitted to the practice of law in the State of California and am a member of the firm of FLEISHMAN, McDANIEL, BROWN & WESTON, a Professional Corporation, attorney of record for Plaintiffs herein.

2. I am familiar with the history of the instant litigation and make the following statements based on my personal knowledge, except for those statements which I make pursuant to my information and belief.

3. On June 4, 1974, this Court entered its judgment against Defendants in this action, which judgment contained the following provisions:

"1. The California obscenity statute, Penal Code §§311, et seq., are in violation of the mandate of the United States Supreme Court as set forth in *Miller v. California*, 413 U.S. 15 (1973).

"2. The defendants shall return to the plaintiffs the property seized from the plaintiffs on November 23 and 24, 1973, in the City of Buena Park, California.

"The Court retains full and complete jurisdiction over the parties and the causes of action for all purposes."

4. A copy of said judgment was duly served upon Defendants, through their attorneys of record, by the Clerk of this Court through the United States mail. I am informed and believe, and thereupon state, that the Defendants, and each of them, have had actual notice of the said judgment by means of conversations that I have had with Deputy District Attorneys C. Brent Swanson, Michael Cappizzi, and John Conley, all of the Orange County District Attorney's Office.

5. The papers heretofore filed in this action show that the property ordered returned to Plaintiffs in this Court's judgment of June 4, 1974, included four prints of the motion picture film "Deep Throat."

6. Notwithstanding the foregoing, Defendants have wholly failed and neglected to obey, comply with and carry out the provisions and requirements of such judgment, and have wrongfully refused so to do.

7. The refusal of Defendants to obey said judgment is calculated to impair, defeat, impede and prejudice the rights of the Plaintiffs, in the following particulars:

(a) On June 6, 1974, I sent a letter by messenger to Defendant CECIL HICKS demanding the return, pursuant to this Court's judgment of June 4, 1974, of four prints of the film "Deep Throat," stating that "We expect the above property to be returned pursuant to the Court's judgment no later than 5:00 P.M. on June 7, 1974. Please inform me of the location where the property may be obtained." [A copy of the said letter is attached hereto as Exhibit "A"].

(b) On June 18, 1974, I sent a letter to Defendant CECIL HICKS, to the attention of John D. Conley, Deputy District Attorney, stating the following:

"On June 6, 1974, I wrote a letter which was handcarried that date to Mr. Hicks requesting immediate compliance with that part of the judgment in the above case ordering the Defendants to return to Plaintiffs certain property seized from Plaintiffs' theater on November 23 and 24, 1973, consisting in part

"Subsequently, your office informed my office that Defendants declined to return the property since an application for stay of judgment was being prepared.

"On June 15, 1974, we received your notice of motion for relief from judgment, for rehearing, and for stay of judgment pending determination of that motion.

"It appears, however, that the application for stay of judgment will not be heard by the Court since the application is not in proper form. Accordingly, the Court's judgment has not been stayed and Plaintiffs demand forthwith compliance with the judgment.

"You have expressed the concern of the Defendants that the state misdemeanor prosecution concerning the exhibition of 'Deep Throat' not be mooted pending possible appeal. It appears that this concern could be met fully by your making copies of the seized films. Plaintiffs would not object to the use of such copies on 'best evidence' *grounds,* but would of course not waive any other objection to the legality or illegality of the seizures. Alternatively, in order to expedite compliance with the judgment, we would not object to Defendants' post-trial motions, and pending appeal if an appeal is taken. Again, we would so agree without waiving any of the legal and constitutional claims raised in this action and in the state criminal prosecution.

"Your immediate attention to this matter will be appreciated." [A copy of the said letter is attached hereto as Exhibit "B"].

(c) To date, I have received no response to the aforesaid letter of June 18, 1974. To date, Defendants have not returned any of the four prints of the film "Deep Throat" to Plaintiffs, despite the fact that no stay, modification or other alteration of this Court's judgment of June 4, 1974 has been obtained by Defendants from this Court, or any other court to which Defendants might have applied for a stay, modification or alteration of the said judgment.

(d) In its Memorandum Opinion dated June 4, 1974, this Court stated:

". . . The objective facts set forth in the first part of this opinion clearly demonstrate the bad faith and harassment which would justify federal intervention. . . . It is sufficient to note that the pattern

of seizures of the plaintiffs' cash receipts and films demonstrate that the police were bent upon a course of action that, regardless of the nature of any judicial proceeding, would effectively exorcise the movie 'Deep Throat' out of Buena Park." [Memorandum Opinion, p. 16].

(e) Notwithstanding the foregoing finding of bad faith and harassment based upon the Defendants' conduct in seizing multiple copies of the same film from Plaintiffs' theater, and notwithstanding the failure of Defendants to return any of the four prints of the film "Deep Throat" previously seized from Plaintfffs' theater, Defendants have, commencing on July 29, 1974, seized three additional prints of the film "Deep Throat" from Plaintiffs' theater, and have seized two copies of the film "Devil In Miss Jones" from Plaintiffs' theater.

(f) I am informed and believe and thereupon state, that on July 29, 1974, at approximately 5:00 P.M., police officers of the City of Buena Park, including RICHARD HAFDAHL, a named Defendant herein, and C. BRENT SWANSON, Deputy District Attorney of the County of Orange, seized from Plaintiffs' theater, pursuant to the purported authority of a search warrant, a print of the film "Deep Throat," and other materials. A copy of the said search warrant is attached hereto as Exhibit "C". At the same time, I am informed and believe, the officers seized a copy of the film "Devil In Miss Jones" from Plaintiffs' theater, pursuant to the purported authority of a search warrant attached hereto as Exhibit "D".

(g) I am informed and believe and thereupon state, that on July 30, 1974, at approximately 3:00 P.M., officers of the Buena Park Police Department, including Defendant HAFDAHL, seized an additional print

of the film "Deep Throat" from the Plaintiffs' theater. I am further informed and believe and thereupon state, that the manager of Plaintiffs' theater, a Mr. Woods, was physically arrested upon a charge of violating the state obscenity statute, was taken to jail, and released after posting bail.

(h) I am informed and believe and thereupon state, that on July 31, 1974, at approximately 1:00 P.M., the said Buena Park police officers seized another print of the film "Deep Throat" from Plaintiffs' theater, bringing to seven the total number of prints in the possession of the Defendants herein. I am further informed and believe and thereupon state that at the same time, the said officers seized a second print of the film "Devil In Miss Jones" from Plaintiffs' theater.

(i) It is my opinion, based upon all of the foregoing, that it is the intention of the Defendants to continue to seize all copies of the film "Deep Throat" and all copies of the film "Devil In Miss Jones" exhibited at Plaintiffs' theater, so long as the said films continue to be exhibited, and until their exhibition has been finally suppressed.

* * *

(b) Exhibit A in Support of Application.

June 6, 1974

CECIL HICKS, District Attorney
700 Civic Center Drive West
Santa Ana, California 92701

Re: Miranda v. Hicks
U.S.D.C. C.D. Cal. Civ. No. 73-2775-F

Dear Mr. Hicks:

On June 4, 1974, the Court in the above-entitled action filed its judgment which provides in part that:

> "The defendants shall return to the plaintiffs the property seized from the plaintiffs on November 23 and 24, 1973 in the City of Buena Park, California."

The property referred to consists of four complete prints of the motion picture "Deep Throat" and related advertising material and records.

We expect the above property to be returned pursuant to the Court's judgment no later than 5:00 P.M. on June 7, 1974. Please inform me of the location where the property may be obtained.

Your cooperation will be appreciated.

Very truly yours,

FLEISHMAN, McDANIEL, BROWN & WESTON

By .....

David M. Brown, Attorney for
Vincent Miranda dba Walnut
Properties and Pussycat Theatre-
Hollywood

DMB/tj

LETTER HAND CARRIED JUNE 6, 1974

bcc: Vincent Miranda

(c) Exhibit B in Support of Application.

June 18, 1974

CECIL HICKS, District Attorney
P.O. Box 808
Santa Ana, California 92701

Attention: JOHN D. CONLEY, Deputy District Attorney

Re: Miranda v. Hicks
No. 73-2775-F

Dear Mr. Conley:

On June 6, 1974, I wrote a letter which was handcarried that date to Mr. Hicks requesting immediate compliance with that part of the judgment in the above case ordering the Defendants to return to Plaintiffs certain property seized from Plaintiffs' theater on November 23 and 24, 1973, consisting in part of four complete prints of the film "Deep Throat."

Subsequently, your office informed my office that Defendants declined to return the property since an application for stay of judgment was being prepared.

On June 15, 1974, we received your notice of motion for relief from judgment, for rehearing, and for stay of judgment pending determination of that motion.

It appears, however, that the application for stay of judgment will not be heard by the Court since the application is not in proper form. Accordingly, the Court's judgment has not been stayed and Plaintiffs demand forthwith compliance with the judgment.

You have expressed the concern of the Defendants that the state misdemeanor prosecution concerning the exhibition of "Deep Throat" not be mooted pending possible appeal. It appears that this concern could be met

fully by your making copies of the seized films. Plaintiffs would not object to the use of such copies on "best evidence" grounds, but would of course not waive any other objection to the legality or illegality of the seizures. Alternatively, in order to expedite compliance with the judgment, we would not object to Defendants retaining one of the four prints of the film pending determination of Defendants' post-trial motions, and pending appeal if an appeal is taken. Again, we would so agree without waiving any of the legal and constitutional claims raised in this action and in the state criminal prosecution.

Your immediate attention to this matter will be appreciated.

Very truly yours,

FLEISHMAN, McDANIEL, BROWN & WESTON

By

David M. Brown

DMB/tj

(d) Exhibit C in Support of Application.

In the Superior Court of the State of California, in and for the County of Orange.

SEARCH WARRANT

THE PEOPLE OF THE STATE OF CALIFORNIA:

TO: ANY SHERIFF, CONSTABLE, MARSHAL, POLICEMAN OR ANY OTHER PEACE OFFICER IN THE COUNTY OF ORANGE, STATE OF CALIFORNIA:

Proof, by affidavits, having been made this day before me by THOMAS HAFDAHL, and having personally viewed the movie entitled, "DEEP THROAT", and after personally reading and considering the opinion in the cases of: *Miranda v. Hicks,* Civil No. 73-2775-F, rendered on June 4, 1974, by the United States District Court, Central District and *Miller v. California,* No. 73-1508, rendered on July 25, 1974 by the United States Supreme Court, and after reviewing the transcript of the Adversary Hearing had before me on November 27 and 28, 1973, and my finding that the movie is obscene made at that hearing, I find that there is probable and reasonable cause for the issuance of the Search Warrant in accordance with Subdivision 3 of the Penal Code, Section 1524.

YOU ARE THEREFORE COMMANDED *Between the hours of 7 a.m. and 10 p.m.,* good cause being shown therefor, to make search of the premises located at and described as:

The Pussycat Theater, 6177 Beach Blvd., Orange County, California, a commercial movie theater showing films for public view in a light brown stucco building on the West side of Beach Blvd., between Commonwealth and Artesia Avenues. The area to be searched includes, but is not limited to: The lobby, business offices, exterior and interior display cases, projector room, and general theater premises;

for the following personal property, to-wit: *All reels of 35 MM film and canisters holding same, for the*

film entitled, "DEEP THROAT". Items to be seized include, but are not limited to: All posters, signs, advertisements, or other writings which promote, advertise, etc., the viewing or contents of the above-named film. All documents, papers, bills, receipts, business records, directives, memorandums, etc., tending to show what persons are responsible for the promotion, management, exhibition or ordering of the above-described film;

and if you find the same or any part thereof, to bring it forthwith before me at the Superior Court of the State of California, for the County of Orange, pursuant to Section 1536 of the Penal Code.

Given under my hand this 29th day of July, 1974.

Byron K. McMillan
Judge of the Superior Court

(Search Warrant)

(4) Reels of Deep Throat in cardboard box, misc. papers and memorandum. 2 time schedules

7-29-74 1725 hrs.

/s/ Sgt. Hafdahl

(e) Exhibit D in Support of Application.

In the Superior Court of the State of California, in and for the County of Orange.

SEARCH WARRANT

THE PEOPLE OF THE STATE OF CALIFORNIA:

TO: ANY SHERIFF, CONSTABLE, MARSHAL, POLICEMAN OR ANY OTHER PEACE OFFICER IN THE COUNTY OF ORANGE, STATE OF CALIFORNIA:

Proof, by affidavit, having been made this day before me by DAVID WILLIAMS, I find that there is probable and reasonable cause for the issuance of the Search Warrant in accordance with Subdivision(s) 3 of the Penal Code, Section 1524.

YOU ARE THEREFORE COMMANDED *between the hours of 7 a.m. and 10 p.m.* good cause being shown therefor, to make search of the premises located at and described as: *The Pussycat Theater, 6177 Beach Blvd., Orange County, Buena Park, California, a commercial movie theater showing films for public view in a light brown stucco building on the west side of Beach Blvd., between Commonwealth and Artesia Avenues. The area to be searched includes, but is not limited to: the lobby, business offices, exterior and interior display cases, projector room, and general theater premises;*

for the following personal property, to-wit: *One (1) complete copy of 35mm film and canisters holding same, for the film entitled "DEVIL IN MISS JONES." Items to be seized include, but are not limited to: All posters, signs, advertisements, or other writings which promote, advertise, etc., the viewing or contents of the above*

described film. All documents, papers, bills, receipts, business records, directives, memorandum, etc. tending to show what persons are responsible for the promotion, management, exhibition, or ordering of the above described film;

and if you find the same or any part thereof, to bring it forthwith before me at the Superior Court of the State of California, for the County of Orange, pursuant to Section 1536 of the Penal Code.

Given under my hand this 29th day of July, 1974.

Byron K. McMillan
Judge of the Superior Court

CECIL HICKS, DISTRICT ATTORNEY
COUNTY OF ORANGE, STATE OF CALIFORNIA

MICHAEL R. CAPIZZI, Assistant District Attorney
BY: ORETTA D. SEARS, Deputy District Attorney
Post Office Box 808
Santa Ana, California 92702
Telephone: (714) 834-3600
Attorneys for Plaintiff

Order of Seizure After Adversary Hearing.

In the Superior Court of the State of California, in and for the County of Orange.

The People of the State of California, Plaintiff, vs. Vincent Miranda dba Pussycat Theater, Walnut Properties, Inc., et al., Defendants. No. M-2248.

Filed: Aug. 2, 1974.

THE PEOPLE OF THE STATE OF CALIFORNIA:
TO: ANY SHERIFF, CONSTABLE, MARSHAL, POLICEMAN OR ANY OTHER PEACE OFFICER IN THE COUNTY OF ORANGE, STATE OF CALIFORNIA:

Pursuant to an affidavit duly subscribed and sworn before me, a search warrant for the theater located at 6177 Beach Boulevard, Buena Park, having been duly issued by this Court ordering the seizure of the film "Devil in Miss Jones" as better described in said search warrant and affidavit which are incorportated by reference as though fully set forth herein, and the defendants by order of this Court having appeared by counsel, to show cause why all copies of said film presently remaining in the above-named theater should not by this Court hearing at which both the People and the defendants were given full opportunity to present evidence having been had and defendants having declined to argue the issue of obscenity or non-obscenity of said film, the Court having viewed the film and heard the evidence presented, and having duly found that the above-named film as well as all copies thereof contained in the 6177 Beach Boulevard Theater: (a) are held for the purpose of exhibition, (b) are obscene beyond any reasonable doubt, (c) are matter defined

by *In re Cianini* as footnote 8 material, and (d) that said material shall leave the jurisdiction of the Court and/or be shown unless seized.

You are therefore commanded between the hours of 7:00 a.m. and 10:00 p.m. to seize all copies without regard to film millimeter size of the above-named film entitled "Devil in Miss Jones" located at 6177 Beach Boulevard, Buena Park, and to deposit the same under the sole and exclusive dominion and control of this court pursuant to Section 1536 of the Penal Code.

It is so ordered.

Given under my hand this 2nd day of August, 1974.

/s/ Byron K. McMillan
BYRON K. McMILLAN
JUDGE OF THE SUPERIOR COURT

This instrument is a correct copy of the original on file in this office
Attest: Aug. 2, 1974
WILLIAM E. ST JOHN
County Clerk and Clerk of the Superior Court of the State of California in and for the County of Orange
BY /s/ Ellen D. Santucci, Deputy

CECIL HICKS, DISTRICT ATTORNEY
COUNTY OF ORANGE, STATE OF CALIFORNIA
MICHAEL R. CAPIZZI, Assistant District Attorney
BY: ORETTA D. SEARS, Deputy District Attorney

Post Office Box 808
Santa Ana, California 92702
Telephone: 834-3600
Attorneys for Plaintiff

Order of Seizure After Adversary Hearing.

In the Superior Court of the State of California, in and for the County of Orange.

The People of the State of California, Plaintiff, vs. Vincent Miranda, dba Pussycat Theater, Walnut Properties, Inc., Edward Lee Bailey, James Samuel Lytell, and Sandy Kay Thompson, and Jesse Lee Crabtree, Defendants. No. M 2248.

Filed: Aug. 2, 1974.

Pursuant to an affidavit duly subscribed and sworn before me, and having personally viewed the material described, a search warrant for the theater located at 6177 Beach Boulevard, Buena Park, having been duly issued by this Court ordering the seizure of the film "DEEP THROAT" as better described in said search warrant and affidavit which are incorporated by reference as though fully set forth herein, and the defendants by order of this Court having appeared and represented by counsel, to show cause why all copies of said film presently remaining in the above-named theater should not by this Court be declared obscene and ordered seized and a hearing at which both the People and Defendants were given full opportunity to and did present evidence and argue the matter both as to the issue of obscenity and as to the validity of the seizure. The Court on the evidence presented at said hearing, having duly found that the above named film as well as all copies thereof contained in the 6177 Beach Boulevard Theater: (A) are held for the purpose of exhibition, (B) are obscene beyond any reasonable doubt, (C) are matter defined by *In re Gianini* as footnote 8 material and (D) that said material shall leave the jurisdiction of the Court and/or be shown unless seized.

You are therefore commanded between the hours of 7:00 a.m. and 10:00 p.m. to seize all copies of the above named 35 mm film "DEEP THROAT" presently located at 6177 Beach Boulevard, Buena Park and to deposit the same under the sole and exclusive dominion and control of this court pursuant to Section 1536 of the Penal Code.

It is so ordered.

Given under my hand this 28th day of November, 1973.

/s/ Byron K. McMillan
BYRON K. MCMILLAN
JUDGE OF THE SUPERIOR COURT

Handwritten insertion at line 15: and any copies of the film Deep Throat which may be delivered or found there on any future date. The court hereby reaffirms and reissues this order—31 July '74. Byron K. McMillan, 2 Aug '74.

Supplemental Points and Authorities in Support of Defendants' Motion for Relief From Judgment and for Rehearing.

In the United States District Court, Central District of California.

Vincent Miranda, et al., Plaintiffs, vs. Cecil Hicks, et al., Defendants. Civil Action No. 73-2775-F.

Filed: July 30, 1974.

ARGUMENT

THE JULY 25, 1974, DECISION ISSUED BY THE UNITED STATES SUPREME COURT IN MARVIN MILLER V. STATE OF CALIFORNIA, No. 73-1508, HAS DETERMINED THAT THE CALIFORNIA OBSCENITY LAWS ARE CONSTITUTIONAL.

On July 25, 1974, the United States Supreme Court issued its decision in the case of *Marvin Miller v. State of California,* No. 73-1508. A copy of the opinion is attached hereto, incorporated by reference and labeled Attachment A.

The majority opinion states:

> The appeal is dismissed for want of a substantial federal question.

The dissent written by Mr. Justice Brennan recites that:

> Appellant was convicted in the Orange County, California Superior Court of distributing obscene matter in violation of California Penal Code §311.2. . . .

Samson Market Co. v. Alcoholic Bev. etc. Appeals Bd., 71 Cal.2d 1215, 1221, fn. 4 [81 Cal.Rptr. 251, 459

P.2d 667]; Wright, Law of Federal Courts, 495; Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expedience in Judicial Review,* 64 Colum.L.Rev. 1, 11 and of value as precedent under the doctrine of *stare decisis. (Ohio ex rel. Eaton v. Price, supra; Samson Market Co. v. Alcoholic Bev. etc. Appeals Bd., supra; People v. United National Life Ins. Co.,* 66 Cal.2d 577, 591 [58 Cal.Rptr. 599, 427 P.2d 199]; *Two Guys from Harrison-Allentown, Inc. v. McGinley,* 179 F.Supp. 944, 949, fn. 4 [revd. on other grounds, 366 U.S. 582 (6 L.Ed.2d 551, 31 S. Ct. 1135)].)

As pointed out by *Ahern v. Murphy,* 457 F.2d 363, the conclusion of its binding precedent value is inescapable in that where a decision of a state court is based on a criminal state statute, the *only* ground for appellate jurisdiction in the United States Supreme Court is an allegation under 28 U.S.C. & 1257(2) that:

> There is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity.

Quite clearly a dismissal for want of a substantial federal question comports with it a finding that jurisdiction in the United States Supreme Court exists by virtue of a claim of alleged invalidity and a ruling that the claim of invalidity lacks merit.

After setting forth the text of the California obscenity statutes, the dissent goes on to recite:

> The Appellate Department of the Superior Court affirmed, and this Court vacated the judg-

ment of that court and remanded the case for reconsideration in light of *Miller v. California,* 413 U.S. 15 (1973), and companion cases. The Appellate Department again affirmed.

In context the decision, therefore, makes clear that this is a conviction under the California obscenity statute reconsidered and reaffirmed by a California court in light of the *Miller v. California, supra,* requirements of specificity. A dismissal of the appeal "for want of a substantial federal question" under the circumstances is a decision on the merits, determinative of the constitutionality of the California obscenity legislation as interpreted by the California Appellate Courts. This fact is pointed out in *Eaton v. Price,* 360 U.S. 246, 3 L.Ed.2d 1200, 1203, where the Court concludes:

> Votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case. . . .

Such a determination on the merit, of course, makes the case controlling as precedent. (See *Ohio ex rel. Eaton v. Price,* 360 U.S. 246, 247 [3 L.Ed.2d 1200, 1202, 79 S.Ct. 978] [opinion of Brennan, J.]; *Ahern v. Murphy* (7th Cir. 1972) 457 F.2d 363, 365.

Accordingly and for all the above reasons, Defendants respectfully urge this Honorable Court to deny Plaintiffs' request for costs and/or attorney's fees because moot, to vacate its prior judgment declaring the California Obscenity Statutes to be unconstitutional, ordering certain evidentiary items returned to Plaintiffs, and awarding costs to the Plaintiffs, and respectfully urges the Court to enter an order dismissing Plaintiffs' complaint.

Affidavit of Oretta D. Sears in Support of Answer to Order to Show Cause in Re Contempt.

Filed on August 9, 1974

* * *

On June 14, 1974, motions for relief from judgment to amend and alter judgment and to correct errors in the judgment was filed by Defendants Hicks and Sears. Motions to amend, vacate, stay, etc. pursuant to Federal Rules of Civil Procedure, sections 59(a) and (d), 60(a) and (b) and 62 were filed by defendants Gourley, Fontecchio, Hafdahl and Harrison. A motion to stay the proceedings was also filed on that date.

On or about June 14, 1974, the Plaintiffs resumed showing of the film "Deep Throat" and of other similar films which continued from that date to July 29, 1974.

On July 25, 1974, the United State Supreme Court issued its opinion in *Miller v. California,* dismissing the appeal "for want of a substantial federal question."

On July 26, 1974, the Appellate Department of the Orange County Superior Court reaffirmed the validity of the seizures, acknowledged that a valid adversary hearing on the issue of obscenity had been had and declared the four copies to be contraband.

On Monday, July 29, 1974, Deputy District Attorney Sears informed the Superior Court that "Deep Throat" was still being shown and asked whether the court wished to issue a new warrant for its seizure. The court issued the search warrant ordering the seizure of the movie "Deep Throat." This search warrant and affidavits in support thereof thereto attached as Attachment B.

On that same date upon affidavit duly sworn to by Officer Williams, a search warrant ordering the seizure of "Devil in Miss Jones", was issued and seizure made pursuant thereto (See Attachment C).

The seizures of "Deep Throat" alleged to have occurred on July 30 and 31 were made pursuant to reissued and revalidated warrants (See Attachment D).

The second copy of "Devil in Miss Jones" allegedly seized on July 31, 1974, was seized pursuant to search warrant issued in conjunction with an order to show cause requesting Plaintiff to appear on Friday, August 2, 1974, at 2:00 p.m., or at any earlier time at defendant's request, and show cause why all copies in the possession of the theatre should not be seized. The warrant further provided that if defendants had no additional copies available for showing, the second copy would be returned pending the Friday hearing (See Attachment E).

[As to each seizure, state criminal complaints have been filed and are pending. In each of the above instances, the copies seized were placed in the court's custody as ordered.] On Friday, August 2, 1974, Mr. Brown appeared at the hearing. He stated that he did not believe the state court had jurisdiction to hold the hearing and when the court declared itself ready to proceed on the merits, the attorney walked out of the courtroom. The state court viewed the movie, heard evidence and issued its order of seizure for all copies of the film in the theatre's possession (See Attachment F).

On August 1, 1974, a message was left with Defendant Sears which stated that Mr. Brown had an appointment with Judge Ferguson for 10:00 a.m. on

Saturday morning, August 3, 1974, and that he would request an order (unspecified) at that time. On August 2, 1974, when Mr. Brown's associate appeared in the state court, no service was made of any type and nothing was said about the Saturday appointment to Defendant Sears.

On Saturday, August 3, 1974, the Court issued its order to show cause in re contempt and *in re* preliminary injunctions, and to return property. Defendant Sears was served personally with the order to show cause and temporary restraining order on Saturday, August 3. However, she was never personally served with the application for the order to show cause and Mr. Brown's affidavits in support thereto although she was able to secure a copy of those documents during the afternoon of Monday, August 5, 1974.

* * *

Supplemental Memorandum Opinion.

United States District Court, Central District of California.

Vincent Miranda, doing business as Walnut Properties; and Pussycat Theatre Hollywood, a California corporation, Plaintiffs, v. Cecil Hicks, District Attorney of the County of Orange, State of California; Oretta Sears, Deputy District Attorney of the County of Orange, State of California; Dudley D. Gourley, Chief of Police of the City of Buena Park, County of Orange, State of California; Arthur Fontecchio, Richard Hafdahl, and Daniel Harrison, Officers of the Police Department of the City of Buena Park, County of Orange, State of California, Defendants. Civil No. 73-2775-F.

Before Honorable Walter Ely, Circuit Judge, Honorable William G. East, and Honorable Warren J. Ferguson, District Judges.

The defendants have filed appropriate motions to amend the judgment in this case which was filed June 4, 1974.

They allege that: (1) this court was factually in error when it held that the plaintiffs were not defendants in a criminal prosecution; (2) the judgment is contrary to the holding of the Supreme Court in *Hamling v. United States*, ... U.S. ...., 42 U.S.L.W. 5035 (U.S. June 24, 1974); and (3) the injunctive part of the judgment should be modified because (a) the money seized has been returned to the plaintiffs and (b) the films are under the custody of the Municipal Court which is not a party to these proceedings.

I

The first issue is one of serious consequence, for it goes to the heart of the court's reasoning on the issue of abstention. The court bottomed its decision on the abstention issue on the fact that no criminal proceedings had been instituted in state court against the plaintiffs by the date on which they filed their complaint in this court.

The evidence submitted by the defendants here reveals the following:

1. On the date of the filing of the complaint in this case, November 29, 1973, there was pending in the state municipal court an 8-count misdemeanor complaint against Edward Lee Bailey and James Samuel Lytell in connection with the exhibition of "Deep Throat" in Buena Park.

2. Copies of that complaint were furnished this court on December 3, 1973.

3. Neither Mr. Bailey nor Mr. Lytell are parties to this action.

4. The complaint in this action was served upon the District Attorney of Orange County by a deputy United States marshal on January 14, 1974; the other defendants had been served a few days before.

5. On January 15, 1974, a day after that service, the criminal complaint in the state municipal court was amended by the District Attorney of Orange County to include Vincent Miranda and Walnut Properties, Inc., plaintiffs in this action.

6. The defendants rely on the amended state criminal complaint and urge abstention.

The operation of the abstention doctrine when criminal charges are pending is outlined in a trilogy of cases decided in 1971: *Younger v. Harris,* 401 U.S. 37 (1971); *Samuels v. Mackell,* 401 U.S. 66 (1971); and *Perez v. Ledesma,* 401 U.S. 82 (1971). In each of those cases, a criminal indictment or information had been filed against the plaintiff *before* a complaint was filed in the federal district court. When no criminal charge is pending, however, the case is governed by the doctrine of *Steffel v. Thompson,* ..... U.S. ....., 42 U.S.L.W. 4357 (U.S. March 19, 1974). There, the Court noted:

> When no state criminal proceeding is pending at the time the federal complaint is *filed,* federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system. . . . 42 U.S.L.W. at 4360 (emphasis added.)

It is clear that for purposes of the abstention doctrine, a determination of whether there is an "ongoing state criminal prosecution" against the plaintiff is measured as of the time of the filing of the complaint in federal court. The fact that the defendants filed criminal charges against the plaintiff after the instant case was under consideration does not alter this court's duty to decide the controversy before it.

Furthermore, the later criminal charges would seem to supply added justification for action by the court. The Chief Justice, in a recent and extensive separate opinion, commented about the burdens and possible ramifications of *Younger v. Harris.* See *Allee v. Medrano,* 42 U.S.L.W. 4736 (U.S. May 20, 1974) (Burger, C. J., concurring in part and dissenting in part.) He there noted that inferences of bad faith can arise

from the common activity of the prosecutors and the police, inferences that the state may have had reasons for bringing a prosecution other than an expectation of securing a valid conviction. While the strict requirements of *Younger* are only of tangential relevance to the prior opinion of this court, the evidence brought to light by the petition for rehearing only serves to strengthen the previous finding of bad faith and harassment. Reasonable people could certainly infer prosecutorial misconduct from the couse of action revealed in the latest petition.

No explanation is given why criminal charges were not instituted against the plaintiffs here until after the filing and service of the complaint in this action. Without such an explanation it is reasonable for the court to conclude that the institution of the criminal proceedings was in retaliation for the attempt by plaintiffs to have their constitutional rights judicially determined in this court. That conclusion surely removes this case from the abstention doctrine of *Younger* and *Mackell.*

II

Defendants have requested that this court reconsider its holding in light of the recent decision of the Supreme Court in *Hamling v. United States,* ..... U.S. ....., 42 U.S.L.W. 5035 (U.S. June 24, 1974). There, the Court upheld the constitutionality of a *federal* statute which prohibits the mailing of obscene matter, holding that the statutory language as construed met the specificity test of *Miller v. California,* 413 U.S. 15 (1973). More exactly, Justice Rehnquist referred to footnote 7 of *United States v. 12 200-ft. Reels of Film,* 413 U.S. 123, 130 (1973) as authority for the construction the Court offered in *Hamling;* i.e., that the

terms "obscene", etc., include the specific "hard-core" matter as described in *Miller* at 25:

> "(a) Patently offensive representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."

See 42 U.S.L.W. at 5043. That such a construction would be possible was noted by this court in its original opinion; there is nothing in *Hamling v. United States* to suggest that the Supreme Court there did anything more than exercise its authority to construe fedral statutes, an authority alluded to in that same footnote 7 of *12 200-ft. Reels.* See *United States v. Thirty-seven Photographs,* 402 U.S. 363 (1971); compare the dissenting opinion of Black, J., *id.* at 384.

More importantly, there is nothing in *Hamling* which would lead this court to believe that the specificity requirements of *Miller* have been overruled. The tenets of *Miller* have not been met, either by the California statute on its face or as construed, either pre-*Miller* or in *Enskat*. There has been no construction by the California courts of an obscenity standard based upon specific acts, nor any formulation comparable to that added to the federal statute in *Hamling*. The Supreme Court in *Hamling,* in fact, points out in detail the infirmity of *Enskat*. In *Hamling* the Court set forth with regard to the federal statute a specific jury instruction which meets the specificity test of *Miller*. However, no such specific instruction is found in *Enskat,* nor can one be inferred. Nothing in that opinion contains language from which an instruction to a jury could be

drawn as to what specific conduct may be constitutionally proscribed.

This court is also faced with the recent dismissal by the Supreme Court of *Miller v. California,* ..... U.S. ....., 42 U.S.L.W. 3711 (U.S. July 25, 1974) (Miller II), "for want of a substantial federal question." When *Miller v. California,* 413 U.S. 15 (1973) (Miller I) was decided in the 1973 term of the Court, the case itself was remanded to the state courts in light of the new obscenity standards developed therein. Upon remand, the case was reaffirmed by the Appellate Department of the California Superior Court of Orange County with the following notation: "affirmed, *People v. Enskat* (1973) 33 Cal.App. 3d 900". *People v. Enskat* was docketed with the Supreme Court sub nom. *Enskat v. California;* the writ of certiorari in that discretionary appeal was denied. 42 U.S.L.W. 3712 (U.S. July 25, 1974).

Enskat is the case discussed and analyzed in the original opinion in this case. The denial of the writ of certiorari in that case does not operate as a decision on the merits. See *Polites v. United States,* 364 U.S. 426, 433 n. 9 (1960); *United States v. Shubert,* 348 U.S. 222, 228 n. 10 (1955). The appeal in *Miller,* however, was taken under 28 U.S.C. § 1257(e) as an appeal of right. This court must now ascertain whether the summary action in Miller II operates as a decision on the merits of the challenge to the constitutionality of the California obscenity statute.

The question is one which has led to commentary by many of this country's preeminent Federal Jurisdiction and Constitutional Law scholars. Professor Bickel would characterize a dismissal for lack of a substantial federal

question as a refusal by the Court to exercise its jurisdiction; a reflection of pragmatic considerations and institutional expediency, but not necessarily a decision on the merits. A. Bickel, *The Least Dangerous Branch* (1962). Professor Wechsler, however, feels that the Court should not have the option to decide or reject those cases before it on appeal as of right. H. Wechsler, *Towards Neutral Principles of Constitutional Law* (1961). Professor Gunther sides with the antidiscretion forces, terming those instances in which the Court has clearly ducked a substantial federal question as "aberrations." Gunther, *The Subtle Vice of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 4 Colum. L. Rev. 1, 12 (1964).

Defendants have mistakenly asserted that Justice Brennan's separate opinion in *Ohio ex rel. Eaton v. Price*, 360 U.S. 246 (1959) forecloses the question and definitely establishes that such a dismissal is on the merits. Justice Brennan was not there speaking for the Court, which itself had done no more than note probable jurisdiction of the case on the basis of a 4-4 vote. Rather, he was expressing his personal displeasure at the decision of four of his colleagues to make known the reason for their votes against noting jurisdiction. His statement was, therefore, no more than one justice's passing comments on an issue not before the Court.

It should be noted tangentially that quite a different issue arises when, after deliberation, the Court affirms a decision below by a 4-4 vote, as happened after oral argument in the *Eaton* case. 364 U.S. 263 (1960). Because of lack of agreement by a majority of the Court, many people, including Justice Brennan, feel that such affirmances, while binding on the parties, have no

value as precedent. See 364 U.S. at 264; *United States v. Plink*, 315 U.S. 203, 216 (1942); *Hertz v. Woodman*, 218 U.S. 205, 212-14 (1910).

Thus this court can do no more than take note of Justice Brennan's statement on the dismissal question, and perhaps contrast it with the apparent thrust of Justice Harlan's dissent in *Redrup v. New York*, 386 U.S. 767, 771 (1967) at 772, in which he seemed to embrace the Bickel view and equate dismissal of a writ of certiorari as improvidently granted with a dismissal of an appeal for want of a substantial federal question. More recently, Justice Rehnquist, writing for the Court in *Edelman v. Jordan*, 94 S. Ct. 1347, 1359-60 (1974), suggested that a summary affirmance would carry less weight as precedent than a written affirmance after deliberation. See *Jordan v. Gilligan*, ... F.2d ... (No. 73-1973) (7th Cir. July 19, 1973).

The courts in several circuits have been confronted with the problem: see, for example, *Ahern v. Murphy*, 457 F.2d 363 (7th Cir. 1972); *Hall v. Thornton*, 445 F.2d 834 (4th Cir. 1971); *Heaney v. Allen*, 425 F.2d 869 (2nd Cir. 1970); *Cross v. Bruning*, 413 F.2d 678 (9th Cir. 1969); *Port Authority Bondholders Protection Committee v. Port of New York Authority*, 387 F.2d 259 (2nd Cir. 1967). Uniformly those courts have held that they will not themselves hear a question the Supreme Court has previously branded as "insubstantial." Two of these courts relied in part on Justice Brennan's opinion in *Eaton, supra*, giving it what this court has discussed above as erroneous precedential value. See 457 F.2d at 364; 445 F.2d at 835. A widely cited student law review article, however, has criticized the *Port Authority* decision, pointing out that

the phrase "want of a substantial federal question" can have several meanings, not all of which should foreclose another federal court from exercising jurisdiction: "Where the Court was presented for the first time with a non-frivolous federal claim, and dismissed it summarily, it would be excessively harsh to hold that no lower federal court could thenceforth rule in favor of the argument advanced." Comment, *The Significance of Dismissals "For Want of a Substantial Federal Question": Original Sin in the Federal Courts,* 68 Colum. L. Rev. 785, 791 (1968).

The highly speculative nature of lower court pronouncements about the import of Supreme Court summary procedures is made evident even in Judge Friendly's opinion in *Port Authority,* 387 F.2d at 262 n. 3; therefore it seems to this court safe to say that there is at least equal merit in a position opposite to that taken in the cases discussed above.

It is apparent that only the Supreme Court itself can resolve the dilemma. When this court considered the problem of the constitutionality of the California obscenity statute and the construction rendered by the state court in *Enskat,* there was certainly a substantial federal question presented. Since the summary treatment of Miller II upon remand is inextricably tied to *Enskat,* a case in which there was merely a denial of certiorari, this court cannot attach plenary precedential value to the summary treatment. There have been no doctrinal changes in the time between the original decision here and this petition for rehearing which should alter the previous determination.

III

All parties concede that the money seized from the theater has now been returned, and therefore it is proper that that requirement be eliminated from the judgment of June 4, 1974.

With reference to the return of the four films, the evidence presented to this court shows the following:

1. On January 29, 1974 at pre-trial hearings in the state municipal court, the Assistant District Attorney of Orange County stipulated that all four of the prints seized were identical. That stipulation was accepted by defense counsel. The court stated "the stipulation will be received."

2. The Assistant District Attorney stated that "Well, I think we're trying to resolve the problem in a practical fashion, Your Honor—It's not our desire to have to show more than one of those films at the time of trial if we can avoid it."

3. Plaintiffs' counsel have stated that they wish to honor that stipulation and therefore do not oppose the state officials' retaining one copy of the film.

Technically the defendants may be correct in saying that they have no power to return the film since it is in the custody of the Municipal Court. However, there was apparently little or no difficulty encountered by anyone involved in returning to the plaintiffs their money. At the January 29th proceeding in the Municipal Court, the Assistant District Attorney stipulated with defense counsel that the money would be returned to the plaintiffs here on their agreement that the police could make copies of the bills and cash and that the copies could then be admitted at trial. The Municipal

Court judge agreed that "the stipulation will be received as stated." The money was thereupon returned.

It appears that there should be no difficulty whatsoever in following a similar approach in returning three of the films to the plaintiffs. If that transaction will require petitioning the state court to release the films, the burden is upon the defendants to so petition.

Paragraph *two* of the judgment of this court will be amended to read as follows:

> 2. The defendants shall in good faith petition the Municipal Court of the North Orange County Judicial District to return to the plaintiffs three of the four film prints seized from the plaintiffs on November 23 and 24, 1973 in the City of Buena Park.

Except as the judgment will be so modified, the motions of the defendants are denied.

Dated this 3rd day of September, 1974.

/s/ Walter Ely
WALTER ELY
United States Circuit Judge
/s/ William G. East
WILLIAM G. EAST
United States District Judge
/s/ Warren J. Ferguson
WARREN J. FERGUSON
United States District Judge

Appellate Department, Superior Court of the State of California, County of Orange.

The People of the State of California, Plaintiff and Appellant, vs. Edward Lee Bailey, James Samuel Lytell, Walnut Properties, Inc., Vincent Miranda, John Doe I and John Doe II, Defendants and Respondents, No. AP-1594.

On Appeal from Municipal Court of the North Orange County Judicial District.

Filed: July 26, 1974.

Hon. Max Eliason, Judge.

This cause having been argued and submitted, and fully considered, judgment is ordered as follows:

It is ORDERED AND ADJUDGED that the order to suppress pursuant to Penal Code Section 1538.5 made and entered in the Municipal Court of the above designated Judicial District, County of Orange, State of California, in the above entitled cause be and the same is hereby reversed, *Aday v. Superior Court* (1961), 55 Cal. 2d 789. The *requisite prompt adversary determination of obscenity under Heller v. New York* (1973), 93 S.Ct. 2789, has been held. *Furthermore, for purposes of the 1538.5 and 1539-40 Penal Code* motion, defendants have not urged non-obscenity of the film.

The cause is remanded to the Municipal Court for further proceedings.

Dated this 26th day of July, 1974.

/s/ Kneeland
KNEELAND, Judge
/s/ Judge
JUDGE, Judge
/s/ Lee
LEE, Presiding Judge